

**BARBADOS**  
**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE**  
**HIGH COURT**  
**(Family Division)**

**No. 68 of 2002**

**IN THE MARRIAGE OF**

**FRANK DACOSTA KNIGHT          Applicant/Husband**

**AND**

**SONIA DELORES KNIGHT          Respondent/Wife**

**Before: The Honourable Madam Justice Kaye Goodridge, Judge of the High Court.**

**2012: May 18**

**2013: April 23**

**Ms. Dawn Shields-Searle, Attorney-at-Law for the Applicant/Husband.**

**Mr. Marvin H.D Patterson, Attorney-at-Law for the Respondent/Wife.**

**DECISION**

***Introduction***

[1] This is an application by the Wife for leave to institute proceedings for an alteration of interests pursuant to **section 23(3) of the Family Law Act, Cap. 214 (the Act)**.

***The Facts***

[2] The parties started to live together at the home of the Husband's mother from 1985. They were married on 16 November 1995. There are two children of the marriage, a daughter born on 5 February 1985 and a son born on 27 July 1988.

- [3] The parties separated during the year 1997 and the Wife vacated the home during that same year. On 4 February 2002 the Husband filed his Application for dissolution of the marriage (the Application) and the decree nisi was granted on 6 June 2002. On 28 March 2003, the court ordered the Wife to pay maintenance to the Husband for the son and granted the Wife reasonable access. The decree became absolute on 27 June 2003.
- [4] On 2 February 2011, the Wife filed an ex parte application, supported by affidavit, for an order that she be allowed to return to the former matrimonial home with immediate effect. That application was dismissed by **Cornelius J** on 10 February 2011.

***The Submissions***

- [5] Ms. Shields-Searle, counsel for the Husband, submitted that, according to **section 23(3) of the Act**, where a decree absolute has been granted, proceedings shall not be instituted after the expiration of 12 months after the date of the making of the decree. Further, **section 23(4)** provides that the court shall not grant leave unless it is satisfied that hardship would be caused.
- [6] Counsel submitted that the evidence tendered by the Wife in support of her application was deficient in many respects and did not meet the standards set out in the authorities dealing with the grant of leave. Counsel then referred to the cases of **McKenzie v McKenzie (1978) FLC 90-476 (McKenzie); Perkins v Perkins (1979) FLC 90-600; Whitford v Whitford (1979) 90-612 (Whitford)** and **Walker v Walker (1984) 91-564 (Walker)**.
- [7] Counsel noted that the meaning of the term “hardship” had been considered in **McKenzie**. She submitted that when the court applied the relevant principles to this case, it was clear that the Wife had not satisfied the court that hardship would be caused to her if leave were not granted.
- [8] It was counsel’s contention that there were discrepancies and inconsistencies between the Wife’s affidavit and her sworn evidence such that her credibility was in doubt. In any event, the evidence tendered did not disclose that the case had any real chance of succeeding.
- [9] Ms. Shields-Searle submitted that the Wife had stated that she has a medical condition, but had provided no evidence as to the nature of that condition or whether this had any impact on the delay in bringing the application.
- [10] Counsel pointed out that the application was being made 8 years after the divorce had been granted. Even if the court was considering the grant of leave, it was obligated to also consider any prejudice which might be caused to the Husband. Finally, the issue of costs had to be taken into account.
- [11] Mr. Patterson, counsel for the Wife, agreed that the cases cited by Ms. Shields-Searle set out the approach which the court should take when dealing with

applications of this nature. However, it was his submission that the Wife had satisfied the requirements for the grant of leave.

- [12] Counsel also submitted that during the marriage the matrimonial property was constructed and the Wife had made a contribution, however small to the home. She was a homemaker, if only for a short time and might have acquired an interest in the property.
- [13] It was counsel's further submission that the affidavit of the Wife indicated that hardship would be suffered if leave was not granted because her earning capacity is limited. It was counsel's belief that no real prejudice would be caused to the Husband.

***The Statutory Provisions***

- [14] **Section 23(3)** of the Act provides:

“(3) Where a decree *nisi* of dissolution of marriage or a decree of nullity of marriage has been made, proceedings within paragraph (d) (i) or paragraph (e) of the definition of “matrimonial cause” (not being proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings in respect of maintenance of a party) shall not be instituted after the expiration of 12 months after the date of the making of the decree, except by leave of the court in which the proceedings are to be instituted.”

- [15] Paragraph (e) of the definition of “matrimonial cause” in **section 2** of the Act is the relevant paragraph for the purposes of this case. That paragraph provides as follows:

“(e) proceedings between the parties to a marriage in respect of the property of those parties, or either of them, being proceedings in relation to concurrent, pending or completed proceedings for principal relief between the parties.”

- [16] **Section 23(4)** provides:

“(4) The court shall not grant leave under subsection (3) unless it is satisfied that hardship would be caused to a party to a marriage or to a child of the marriage if leave were not granted.”

***Discussion***

- [17] The clear intent of **section 23(3)** is that the parties to a marriage which has ended should settle their financial affairs within a reasonable time in order to bring finality to their relationship. However, **section 23(4)** empowers a court to grant

leave to a party to pursue a claim outside of the prescribed time limit in circumstances where hardship would be caused if leave were not granted.

[18] In *Whitford*, the Family Court of Australia considered an application brought by a wife seeking leave to file an application for property settlement and maintenance three years out of time pursuant to **section 44(3) of the Family Law Act 1975**. The court held that on an application for leave under **section 44(3)** (our 23(4)) two broad questions arose for determination, namely:-

(i) Whether the court is satisfied that hardship would be caused to an applicant or a child of the marriage if leave were not granted; and

(ii) If the court is so satisfied, whether in the exercise of its discretion the court should grant or refuse leave.

[19] The court also decided that:

“The requirement, that the Court must be satisfied that hardship would be caused if leave were not granted, implies that it must be made to appear to the Court that the applicant would probably succeed, if the substantive application were heard on the merits. If there is no real probability of success, then the Court cannot be satisfied that hardship would be caused if leave were not granted. Further, the matter with which the Court is concerned is not whether the applicant or a child is suffering hardship, but the question is whether the applicant or a child would suffer hardship if leave were not granted.”

[20] It was also stated in *Whitford* that the meaning of “hardship” is akin to such concepts as hardness, severity, privation, that which is hard to bear or a substantial detriment. The term “substantial detriment” is the generally accepted interpretation of the word “hardship”. The question is whether on the applicant’s material he or she has a reasonable claim to be heard by the court.

[21] In the opinion of the court the principles enunciated in *Whitford* ought to be applied in the determination of the Wife’s application. Is this court satisfied that hardship would be caused to the Wife if leave were not granted?

[22] Although this is not a trial of the Wife’s application for property settlement, it is necessary on this application for the Wife to demonstrate that she has a reasonable claim to be heard by the court in order for relief which she seeks to be granted.

[23] It must be stated at the outset that the court has had great difficulty with the credibility of the Wife for the following reasons. Firstly, it is the Wife’s

contention that she and the Husband built the matrimonial home together and that she was personally involved in the construction.

- [24] According to paragraph 6 of the Wife's affidavit, she was still living at the home after the divorce and she continued to take care of the property. The Wife maintained this position under cross-examination, but then modified it by stating that she did not remain in the home too long after the divorce.
- [25] I do not accept her evidence as being truthful on this point, for in the Application it is stated at paragraphs 8 and 9 that the parties separated in 1997, and that the Wife left the home in the latter part of 1997 and had not returned up to the date of filing of the Application. The Wife did not file an answer and the proceedings were uncontested.
- [26] Secondly, at paragraph 8 of her affidavit, the Wife deposed that they moved into the home in 1985. However, she also stated that in 1985 they were living at the Husband's mother and that in 1988 when the second child was born she was still residing there.
- [27] Under cross-examination, the Wife stated that while she lived at the house in August 2010, the Husband had remarried and his wife was living at the same house. Yet the Wife would have the court believe that she was cleaning the house and cooking for the children during this period.
- [28] Thirdly, the Wife also alleged that she and the Husband started dating when she was 17 years old and that she lived with him from that time. Paragraph 4 of the Application states that the Wife was born in Christ Church, Barbados on 21 June 1961 and this is also stated in the Lost Passport Form which was exhibited. That being the case, the Wife could not have been 17 years old in 1985.
- [29] Fourthly, the Wife alleged that the Husband had placed her before the Magistrate's Court in an effort to have her evicted. However, the evidence has disclosed that it was the Wife who had applied to the Court for a restraining order against the Husband which was refused. This occurred against the background of the Husband allowing the Wife back into the home when she became ill and the Wife's admission that the Husband had told her that she could only remain there until she got better.
- [30] In the court's opinion, the Wife's evidence was contradictory and unreliable in many respects. She was not a credible witness and it is my finding that she was a witness on whose evidence the court could not rely.
- [31] Further, the Wife provided no evidence in her affidavit as to the nature of her contribution to the construction of the matrimonial home. It was only during cross-examination that the Wife stated that during the marriage the Husband provided for the family, paid the bills and she bought food from the small wages that she earned. She also acknowledged that it was the Husband who was building the house himself and that construction continued over the years.

- [32] It is clear to the court that the Wife was not in a position financially to contribute to the construction of the home and any contribution which she made was de minimis.
- [33] I turn now to the issue of delay. It is beyond dispute that substantial delay occurred prior to the filing of this application, which was brought some eight years out of time. The Wife's explanation for the delay is that as far as she can recall, she was not advised that there was a limitation period in effect for the settlement of property issues.
- [34] Even if the court accepts that the Wife has provided a reasonable explanation for the delay, there is still the critical issue of the quality and character of the potential claim. Or, to put it another way, has the Wife shown in the particular circumstances of this case that she would suffer hardship by the refusal to grant leave.
- [35] It is the finding of the court that the Wife's evidence as to her contributions to the former matrimonial home was scant, devoid of detail and of such a nature that a court would not be able to assess her contribution with any degree of certainty. It is also my finding that, on the evidence adduced, the Wife has not shown any real probability that her claim would succeed. Further, the court is not satisfied that hardship would be caused if leave were not granted.
- [36] Even if the court had considered granting the Wife leave, there would be the question of any prejudice which might be suffered by the Husband. This was a short marriage which ended many years ago. In the intervening years the Husband would have completed the construction, and over time expended funds in preserving and improving the property. With the effluxion of time it is unlikely that the Wife's application could be tried adequately or fairly to the Husband. The grant of leave to my mind would result in great prejudice to the Husband, having regard to all the circumstances of the case.

### **Disposal**

- [37] The Wife has not satisfied the court that hardship would be caused to her if leave were not granted. It is therefore ordered that the application be dismissed. There is no order as to costs.

**Kaye Goodridge,**  
Judge of the High Court.