BARBADOS

No. FL 98 of 2017

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(FAMILY DIVISION)

IN THE UNION OTHER THAN MARRIAGE OF:

ANGELA DOREEN GRANNUM **APPLICANT/SPOUSE**
Of #49 Mahoe Circle
Union Development
St. Philip

AND

WINFIELD ALONZO QUINTYNE **RESPONDENT/SPOUSE**
Of #49 Mahoe Circle
Union Development
St. Philip

Before the Honourable Mr. Justice William Chandler, Judge of the High Court

Date of Hearing: 7 March 2018

Date of Decision: 22 March 2019

Appearances:

Ms. Cheryl Blackman Attorney-at-law for the Applicant/Spouse
Mr. Deighton Rawlins Attorney-at-Law for the Respondent/Spouse

DECISION

The Application and Brief Background

[1] This matter involves an application by the Respondent, Winfield Quintyne to strike out the application of the Applicant, Angela Grannum filed 3 March 2017 for the following relief:

> "(a) That the court declares that the relationship between the parties from the year 1978, until February 1st 2016, constituted a union within the meaning of the **Family Law Act CAP 214.**
> (b) A declaration that the Applicant and the Respondent are the joint owners in equal shares of the dwelling house situate at #49 Mahoe Circle Union Development, St. Philip in this Island.
> (c) Further or alternatively, an Order altering the interests of the Applicant and the Respondent in the said dwelling house so as to vest not less than a one half thereof in the Applicant.
> (d) …
> (e) …"

[2] The application was supported by an affidavit filed 3 March 2017. An answer was filed 6 April 2017 disputing the contention that the parties lived together as man and woman within the year immediately before the institution of these proceedings. A reply was filed on 19 April 2017.

[3] Mr. Deighton Rawlins, counsel for the Respondent, submitted that the affidavit in support of the application demonstrated that the application was filed out of time, specifically paragraph 15 which reads as follows: "Over the past three years the relationship had steadily deteriorated and we lived separate lives. The respondent had become for some time verbally abusive

and had supported my first daughter in her consistent disrespectful behavior towards me."

[4] Paragraph 6 of the reply states "the Applicant denies that the parties have not 'lived together as man and woman within the year immediately before the institution of these proceedings', save and except that the Applicant has denied cohabitation due to the Respondent's inability to perform the sexual act." At paragraph 7 the Applicant deposed that the intention to sever the relationship arose only in February 2016. She asked the Court to dismiss the application to strike out the proceedings and to award costs to herself.

[5] Ms. Blackman submitted that the Court ought to allow the application to proceed.

[6] On 7 March 2018, after hearing oral submissions and at the Applicant's request, the court ordered the Applicant to file and serve submissions with respect to the filing of the answer and the point of limitation within 14 days of that date. The court also ordered the Respondent to respond within 14 days of service of those submissions on him. Counsel did not comply with this order.

[7] On 16 April 2018, the Applicant filed an application for leave to file out of time, and to proceed on her original application filed 3 March 2017. At paragraph 2 she noted that an application was filed for "dissolution of the

union other than a marriage". At paragraph 3 the application states that the parties had been separated since February 2016 and at paragraph 4 it is stated that the application was filed out of time.

[8] In the affidavit in support filed 16 April 2018, the Applicant spouse concedes that the application was filed out of time due to miscommunication between herself and her Attorney-at-Law and acknowledges that she must seek leave of the court in order to pursue the application. At paragraph 2 she deposes that she would incur additional costs, which would cause her to suffer hardship if she had to file her application again.

Issue

[9] Having regard to the Applicant's concession that the application was filed out of time, the sole issue for determination is whether the court should exercise its discretion in favour of extending the stipulated time in **Section 39 (1)** of the **Family Law Act (FLA)**. If this issue is resolved in the affirmative, it will obviate the need to consider the strike out application.

The Law

[10] The **FLA Section 39** as amended provides that:

> (1) " "union other than a marriage" or "union" " means the relationship that subsists between a man and a woman who are not married to each other; and subject to subsections (2) and (3), have co-habited continuously for a period of 5 years or more, and have so cohabited

within the period of 12 months immediately preceding the institution of the proceedings.”; and

(2) …

(3) Upon an application of any party to proceedings between parties to a union other than marriage or a union, the court may extend the period of 12 months of such a union, mentioned in subsection (1), by such longer period as the court thinks fit where the court is satisfied that a party to the proceedings or a child of the union will suffer hardship if the extension is not granted.”

Discussion

[11] The definition of a union other than a marriage under **Section 39 of the FLA** requires that the parties have cohabited within twelve (12) months immediately preceding the institution of proceedings. It is conceded that the application was filed out of time, so that the application is caught by the twelve month limitation period. This was held to be fatal under the FLA prior to its amendment (See: **Shepherd v Taylor, No. 346 of 1986 unreported Barbados**). Section 39(3) however, gives the court the discretion to extend this 12-month period, if the court is of the view that to do otherwise would cause hardship to the Applicant. The Applicant must therefore satisfy the court that hardship would be suffered by a refusal to extend the time as stipulated.

[12] Ms. Deborah Blackman, Counsel for the Applicant, argued that to file a new application would result in hardship to the Applicant. No evidence of the nature and extent of the hardship has been provided. No counter to the Applicant's bald statement that she would suffer hardship has however been filed on affidavit. The court is left to exercise its discretion solely on the basis of the affidavit evidence on file. In exercising my discretion, I must bear in mind that the overriding objective of the law is to do justice between the parties to a suit. Though the overriding objective is contained in the **CPR** and not in the Family Law Rules, its ethos also resonates in the family law where considerations such as the homemaker provisions, direct and indirect contributions to the acquisition, conservation and improvement of property are to be considered in determining the interests of parties. Simply put, I am of the view that the overriding objective is a cornerstone of justice in general and is not confined to the civil law, as distinct from the family law, in particular.

[13] I have read the affidavits and have digested the contents thereof. In her affidavit dated the 3 March 2017, the Applicant deposed that she contributed significantly to the upbringing of the two children of the relationship. The Applicant deposed that she furnished the entire house, which she and the respondent lived in, and also made additions to the home. Ms. Grannum also

deposed that she contributed to the bills and general upkeep of the home. Ms. Grannum's contributions to the family extended to her children's tertiary education, as well as the care of the Respondent after he suffered a stroke, and subsequent health challenges. The salient parts of her affidavit in support are now reproduced:

> "4. I entered into a relationship with the Respondent in the year 1978. At the time we lived in separate residences until we could complete the construction of the family home located at #49 Mahoe Circle. Union Development in the parish of St Philip in this Island.
>
> 5. While we lived at separate locations we maintained a continuous relationship. The Respondent ate, slept, had his laundry done at my residence and we generally were a family. I raised our two children and worked to cover expenses which were not covered by respondent.
>
> 6. In 1979 we had the two children first of two children of that union DAWN NICOLE GRANNUM and in 1987 we had a second child CHEREDA OLIVIA GRANNUM.
>
> 7. In August of 2002, I moved into the house at #49 Mahoe Circle, Union Development, St. Philip together with our two children. The respondent did not move into the house until later that same year.
>
> 8. At that time the house was unfurnished and unfinished. I furnished the entire house with the furnishing from my house and had the house painted, trowel plastered and tiled both indoors and outdoors. I also had additional cupboards built and had the house treated for termites.
>
> 9. I alone maintained the home during that period, did the landscaping and the maintenance of the house. 1 also paid for an extension to the house which I used as a workshop which allowed me the flexibility to work from home, to assist with the support of the children and later my grandson, as well as being at home when the children returned from school.

> 10. Over the years I paid bills, made and installed draperies and all soft furnishings, repainted the house, paid the monthly telephone and internet bills and generally took care of the house. I supplemented the money which Respondent provided for food and other supplies.
>
> 11. I assisted with all fees for after school lessons for both children and assisted my first daughter with costs for her studies at the Barbados Community College.
>
> 12. When our second daughter CHEREDA OLIVIA GRANNUM was accepted to University of the West Indies at Mona in 2006. I took a loan from the Credit Union to assist her with the cost of travel and setting up fees. I accompanied her to make sure that she lived in a secure and safe place. I also wired money regularly to ensure her living expenses were met over the three years she studied in Jamaica.
>
> 13. The house at Union had been built without a mortgage so effectively we split the household and maintenance expenses.
>
> 14. In 2002 the Respondent had a mild stroke and underwent an unrelated surgery. I nursed him back to health."

[14] In his answer filed 6 April 2017, the Respondent deposed that he was married to Ira Quintyne from 1964 until 29 May 2001 when she died. This answer does not speak to the factual matters deposed to by the Applicant and set out at paragraph 6 of this decision since the respondent challenged the application on a point of limitation.

[15] It is against this substratum of pleadings, that I am called upon to decide whether to extend the time for filing the application under **section 39 (3)**. As set out in the legislation it is necessary to satisfy the court that a party to the

proceedings or a child of the marriage would suffer hardship if no extension is granted. This involves a two-step process:

1. I must be satisfied that the applicant has a reasonable claim to an alteration of property interests; and
2. I must also be satisfied that the applicant would suffer hardship if leave was not granted.

[16] **Section 44(3) of the Family Law Act of Australia** contains the same limitation of twelve months for filing an application, except by the leave of the court or by consent of the parties. **Section 44 (4)** provides that the court shall not grant leave unless it is satisfied that, *inter alia*, hardship would be caused to a party to the marriage if leave were not granted. These sections are in relation to the grant of a decree absolute. We are concerned with a union other than marriage, however, I am of the view that the same considerations apply.

[17] Anthony Dickey in his text *Family Law*, 5th Edn, Lawbook Co 2007, in distilling the principles from the Australian cases, opines that:

> “By "hardship" … is meant a substantial detriment. What constitutes a "substantial detriment" depends upon the circumstances of each case. In many cases the substantial detriment is the inability of a spouse to pursue a claim for maintenance or an alteration of property interests where the resulting loss is significant in light of his or her financial circumstances. The detriment need not, however, be exclusively financial. It may, for example,

> involve a need to sever equitably an economic relationship that exists between the parties, especially where "matrimonial cause" (ca), with s. 8(1)(a), would prevent recourse to alternative relief under State or Territorial law.
>
> It is now quite clear that the mere loss of the right to litigate is not sufficient to constitute hardship."

[18] In the case of **In the marriage of Whitford [1979] 4 FLR 754**, the court sought to define 'hardship' in the context of Section 43-44 of the Family Law Act of Australia. The court there stated at paragraph 30 "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 probability of success then the Court cannot be satisfied that hardship would be caused if leave were not granted."

[19] Further, at paragraph 40 the court said "…the legislature intended to confer power on the Court to grant leave to institute proceedings in order to avoid hardship. Having regard to the nature of the jurisdiction which this Court exercises, this power should be exercised liberally in order to avoid hardship, but nevertheless in a manner, which would not render nugatory the requirement that proceedings should be instituted within a year from the *decree nisi*."

[20] I am of the view and hold that **section 39(3)** ought similarly to be interpreted.

Conclusion

[21] Whilst I am not called upon, at this juncture, to decide upon the issue of the applicant's share, if any, in the property, I am satisfied that (1) she has a reasonable claim to an alteration of property interests and (2) not to extend the time as stipulated in **section 39** of the **FLA** would cause hardship to the applicant. There is a pending application for valuation of the dwelling house and, unfortunately, the applicant has not filed a statement of financial circumstances. Notwithstanding these matters, the affidavit evidence suggests that the applicant will suffer significant detriment if she is unable to pursue her claim, as the loss of a possible interest in the property would be significant.

[22] I am also of the view that no useful purpose will be served by making the applicant re-apply with the attendant costs attached to such a process.

[23] I see no prejudice to the respondent in extending the time and am of the view that it is also in his interest to have this matter litigated as soon as possible having regard to his health challenges. I am also of the opinion that the interests of justice would not be served by driving the applicant from the judgement seat by striking out her application. I, therefore, dismiss the application to strike out and exercise my discretion to extend the time under **section 39 (3)** of the **FLA**.

[24] The normal rule in relation to family proceedings is that each side should bear their own costs. In the instant matter no argument has been advanced by the respondent to convince this Court to deviate therefrom.

Disposal

[25] The court therefore orders that:

1. The twelve-month period as stipulated in Section 39 (1) is hereby extended to March 3rd, 2017.
2. The appellant to file and serve a Statement of Financial Circumstances within fourteen (14) days of today's date.
3. The respondent to file and serve an affidavit in response together with a statement of Financial Circumstances within twenty-eight (28) days of today's date.
4. The property be valued by a competent valuer to be agreed between the parties and the cost of such valuation to be equally shared or in default of agreement, each party to have their own valuation done by a competent valuer of their choice at their own expense.

5. The matter to be set down for hearing by the Registrar of the Supreme Court within six months of today's date.
6. Each party shall bear their own costs.

William J. Chandler
High Court Judge