



[2021] JMSC Civ. 133

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 02410

BETWEEN	ANDREA PAULETTE WRIGHT-ANDERSON (By Boysie Roy Wright, Guardian Ad Litem)	CLAIMANT
AND	ANDREW HERMAN ANDERSON	DEFENDANT

IN CHAMBERS

Annette Johnson instructed by Annette Johnson & Co., Attorneys-at-Law for the Claimant.

Sherica Taylor instructed by Bertram A. Anderson, Attorney-at-Law for the Defendant.

Heard: 31st May and 16th July 2021

Civil Procedure - CPR 26.3 and 26.9 - Application to strike out statement of case for failure to comply with court order where no consequence for failure to comply was specified - Delayed compliance - Considerations.

Matrimonial Property - PROSA - Section 13 (2) application for extension of time to bring claim for division of property - General considerations - Stage of proceedings at which application made.

Survivorship - Severance of joint tenancies and interests jointly held.

C. BARNABY, J

INTRODUCTION

[1] On the 31st May 2021 two applications came on for hearing before me and a decision on each was reserved to today's date to enable Counsel to file written submissions in respect of issues raised by the court during the course of oral submissions. Those written submissions were duly received.

[2] The first application in time is the Defendant's Notice of Application for Court Orders filed 11th October 2019. He asks that the Fixed Date Claim Form, wherein the Claimant claims a declaration that she is entitled to an equal share in the family home, among other relief, be struck out.

[3] The Claimant's Notice of Application for Court Orders filed 30th October 2019 was also before me. It is for orders to extend the time within which to file her claim under the Property Rights of Spouses Act (PROSA); and to strike out the Defendant's Affidavit in Response to the claim for failure to comply with the Order of L. Pusey J made on 1st May 2019. The application is supported by the affidavit of Mr. Boysie Roy Wright who was appointed Guardian Ad Litem to continue proceedings, following the death of his daughter Mrs. Wright-Anderson on the 27th August 2019.

ISSUES & CONCLUSIONS

[4] Having considered the applicable law, the evidence and submissions, I find that the following issues dispose of the applications.

(i) Does the Defendant's failure to timeously comply with the Order of L. Pusey J, for which no sanction was imposed, warrant the striking out of his affidavit filed in response to the claim in circumstances where there was compliance ahead of the date fixed for trial?

(ii) Should the court exercise the discretion to extend the time within which the Claimant is permitted to bring a claim for division of property under PROSA, having regard to the stage at which the proceedings have reached and the nature of the Defendant's response to the claim?

(iii) Does the Claimant's claim fail to disclose any reasonable grounds for bringing a claim to enable it to be struck out?

[5] For reasons which follow, I find that the issues are to be determined thus.

- (i) Although the Defendant failed to comply with the Order of L. Pusey J within the time limited, his Affidavit in response to the claim should not be struck out in circumstance where there was compliance ahead of the trial date, and the court is able to justly dispose of the claim.
- (ii) The Claimant's application for an extension of time within which to file a division of property claim under PROSA should be refused as the delay in filing the claim was not explained sufficiently or at all, and to grant it would be prejudicial to the Defendant who relies on the limitation defence under the Act.
- (iii) Outside of a claim for division of property under section 13 of PROSA, the Claimant was competent to file a claim under section 11 of the Act for a determination on questions relating to the title to or possession of property during the subsistence of the parties' marriage; for the partition of property jointly held under the Partition Act; or to have property questions settled in accordance with the rules of common law and equity. In these circumstances it cannot be said that the Fixed Date Claim Form fails to disclose any reasonable ground for bringing the claim to warrant its striking out.

REASONS

- i. Does the Defendant's failure to timeously comply with the Order of L. Pusey J, for which no sanction was imposed, warrant the striking out of his affidavit filed in response to the claim in circumstances where there was compliance ahead of the date fixed for trial?**

[6] The Claimant applies to strike out the Defendant's affidavit in response to the claim pursuant to CPR 26.3, on the ground that he failed to comply with the Order of L. Pusey J made at the first hearing of the Fixed Date Claim Form on 1st May 2019. On that occasion both parties were represented by Counsel and the following timetable fixed.

1. *The Respondent is to prepare, file and serve an Acknowledgment of Service on or before the 8th of May, 2019.*
2. *The Respondent is to file an Affidavit in Response on or before the 31st of May, 2019.*
3. *The Claimant is permitted to file any Affidavit in Response to the Respondent on or before the 30th of June 2019.*
4. *The Respondent is to file any further Affidavit on or before the 31st of July, 2019.*
5. *Both parties are to be present at the hearing for cross-examination if necessary. Cross-examination is limited to 25 minutes for each party.*
6. *Written submissions with Authorities are to be filed and exchanged on or before the 7th of October, 2019.*
7. *Oral Submissions are limited to 30 minutes for each party.*
8. *The matter is set for hearing on the 30th of October, 2019 at 2:00 p.m. for 2 hours.*
9. *The Claimant's Attorney-at-Law is to prepare, file and serve this Order.*

[7] It is also contended that the Defendant's failure to comply with the Order of the court, in particular the filing and service of his affidavit in response to the claim deprived Mrs. Wright-Anderson, who was then seriously ill, from responding to the affidavit before her death. While the Defendant's failure to comply with the orders of the court is not condoned, I do not believe the striking out of his statement of case in the circumstances of the case is warranted.

[8] It was stated by Harris J.A. in **S & T Distributors Limited and S & T Limited v. CIBC Jamaica Limited and Royal & Sun Alliance SCCA** 112/04 delivered 31st July 2007 [29] for example, that

... striking out ... is a severe measure. The discretionary power to strike out must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out and balance them carefully against the principles

*as prescribed by the particular cause of action [or defence]
which is sought to be struck out...*

- [9] The Defendant did not file his affidavit in response to the claim or his submissions until 9th August and 16th October 2019, some two (2) months and ten (10) days respectively, after each were due to be filed and served. It is Mr. Wright's evidence that the Defendant also failed to comply with Justice Pusey's order to file and serve an Acknowledgement of Service on or before 8th May 2019. He goes further to say that he was advised by Counsel Ms. Johnson and verily believes that the Defendant only attempted to serve his affidavit in response to the claim in or about 22nd August 2019, and that she refused to accept service of any documents from the Defendant at the time because they were being filed and served out of time. A copy of the affidavit was said to have been retrieved by Counsel from the Supreme Court Registry and it was discovered that the Defendant raised new allegations, denials and outright untruths. Counsel he says was unable to receive instructions about these matters from Mrs. Wright-Anderson who was then gravely ill and hospitalised.
- [10] By way of example, he raises the Defendant's denial that he assaulted Mrs. Wright-Anderson. He avers that his daughter had made a complaint to him about an assault in October 2014 when she left the family home. It is also his evidence that the Defendant was locked up by Police, charged with assault occasioning bodily harm and brought before the then Resident Magistrates' Court. No other example was supplied.
- [11] He requests that the Defendant's affidavit in response to the claim be struck out and that judgment be entered in favour of the Claimant *"in terms of selling the family home, dividing the proceeds and recouping occupation rent, rentals from the flats at the family home and the amount of \$400,000.00 lent to the Defendant from the Defendant's share of the proceeds of sale."*
- [12] In his affidavit in response to the application to strike out his statement of case, the Defendant states that his failure to comply with the orders of the

court was not deliberate. He expresses his regret for failing to comply and avers that there were delays in communicating with his Attorney-at-Law for instructions to be received so as to properly respond to the claim. He also states that he wanted to make sure that his response was comprehensive and that it had taken him some time to get a copy of the documents on which he intended to rely. He also avers that he was advised by his Attorney-at-Law and verily believes that as soon as the documents were ready, attempts were made to serve them on the Claimant's Attorney-at-Law who initially refused to accept service. He prays in aid the exercise of the court's discretion to allow documents filed out of time to stand as duly filed.

- [13]** Pursuant to CPR 26.9, where the consequences of failure to comply with a rule, practice direction or court order has not been specified, the court is empowered to rectify procedural errors on or without the application of a party. Unless the court so orders, the failure to comply does not invalidate any step which has been taken in the proceedings. Accordingly, where no consequence is specified for failure to comply with an order of the court, a party who refuses to accept service of documents filed, albeit out of time, may find that he does so at his own peril.
- [14]** While there were delays on the part of the Defendant in complying with the orders of the court, I do not regard the delays as inordinate. I also accept as averred by the Defendant, that the delays in complying with the orders of the court were not deliberate.
- [15]** In respect of the Defendant's delay in filing and serving an acknowledgment of service, I do not find that this should preclude him from defending the claim. As evidenced by the presence of his Attorney-at-Law at the first hearing of the Fixed Date Claim Form on 1st May 2019, the Defendant submitted to the jurisdiction of the court. Orders were also made to enable him to defend the claim.
- [16]** As it relates to the filing and service of the Defendant's affidavit in response to the claim, it is his evidence, which I accept, that he wished to

properly respond to the claim and that it had taken him some time to get the supporting documents together. There is no evidence before me that the delay in filing and serving the affidavit in response to the claim was done with the intention of depriving Mrs. Wright-Anderson of an opportunity to reply. Additionally, the affidavit, although filed and attempted to be served late, did not affect the parties' ability to meet the trial date, which was previously fixed. A like observation is made in respect of the Defendant's written submissions.

- [17]** Although the trial was aborted, it was rendered necessary by a matter outside of the Defendant's control. At the date of the trial, no guardian ad litem had been appointed to continue the litigation following the death of Mrs. Wright-Anderson on 27th August 2019, some two (2) months before the trial date. The application in that regard was only filed on the 30th October 2019, the day of the hearing of the Fixed Date Claim Form. It is on that same application that the Claimant asks that the Defendant's affidavit in response to the claim be struck out and for an extension of the time within which to bring the claim for division of property under PROSA.
- [18]** The Claimant's various applications followed the Defendant's application filed on 11th October 2019 and fixed for hearing on 30th October 2019, where he asks that the Fixed Date Claim Form be struck out on the basis that it disclosed no reasonable grounds for bringing a claim. Among other things, the Defendant relied on the fact that the claim for division of property was not filed within the time limited by PROSA.
- [19]** On a reading of the competing affidavits, there are factual disputes as to the circumstances under which some property was acquired and whether the Defendant had borrowed money from Mrs. Wright-Anderson to make him indebted to her. While a court in exercise of its case management functions may permit parties to file further affidavit evidence, responses and replies to affidavits as Pusey J had done here, it must be remembered that a party, when approaching the court, has an obligation to put his case fully. Where the claim is by way of a fixed date claim form, the claimant is

generally required to file evidence in support of her claim at the time the claim is made.

- [20] Mrs. Wright-Anderson did file affidavit evidence in support of her claim but had passed before she could reply to the Defendant's affidavit in response. Death, whilst unfortunate, is one of the vicissitudes of life that can affect any litigation and the court in those circumstances must no doubt strive, as it always does, to do justice between the parties to the litigation.
- [21] Notwithstanding Mrs. Wright-Anderson's inability to respond to the Defendant's affidavit, I believe that a just resolution of the dispute can still be had without exercising the draconian power to strike out the Defendant's statement of case. To the extent that the Defendant's averments are inconsistent with those made by the Claimant, robust cross examination of the Defendant based on that evidence and such instructions which are available, and which enabled Mr. Wright to aver that the Defendant's affidavit in response "*contained new allegations, denials and outright untruths*" can no doubt be used to effect. In respect of allegations of abuse, which Mr. Wright says was the subject of criminal proceedings, the court's records should also be able to provide some assistance.
- [22] It is in all the foregoing circumstances that I refuse the Claimant's application to strike out the Defendant's affidavit in response to the claim. There being no sanction specified by L. Pusey J for failure to comply when he made the orders at the first hearing, I also exercise my discretion to permit the documents filed and served out of time to stand as duly filed and served so that the claim may proceed to trial.
- [23] While it is usual that costs follow the event, delay and non-compliance with the orders of the court are to be discouraged. I will therefore order the Defendant to bear his own costs in respect of this portion of the Claimant's application.

- ii. **Should the court exercise the discretion to extend the time within which the Claimant is permitted to bring a claim for division of property under PROSA, having regard to the stage at which the proceedings have reached and the nature of the Defendant's response to the claim?**

&

- iii. **Does the Claimant's claim fail to disclose any reasonable grounds for bringing a claim to enable it to be struck out?**

[24] Pursuant to Section 13 of PROSA,

- (1) *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*
- (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.*
- (3) *For the purposes of subsection (1) (a) and (b) and section 14 the definition of "spouse" shall include a former spouse.*

[25] There is no dispute between the parties that the claim for the division of property under section 13 of PROSA was filed outside of the time prescribed for its filing and therefore in a state of suspended validity; that the court nevertheless reserves the discretion to extend the time so that a

section 13 claim may proceed; or that the application for extension may be made by the Guardian ad Litem, the deceased spouse having filed the claim under the Act prior to her death. It is submitted on behalf the Claimant that the court, in the circumstances of the case, should exercise its discretion to grant the application for extension of time. I am unable to accede to that entreaty.

[26] I believe we are at a stage in the lifetime of PROSA to say without the citation of authority, that the court in exercising the discretion given to it by section 13(2) to extend time is required to consider the length of the delay, the reasons for delay, the prima facie merits of the claim, and whether there will be prejudice to the parties, particularly the defendant who may benefit from the statutory limitation period. It is to these matters that I now turn.

Length of Delay

[27] There are a number of events which are capable of triggering an application for the division of property under section 13 of PROSA. At the time of the filing of the claim on 26th June 2018, the parties though married were estranged. The Claimant in her evidence filed in support of the claim averred that she left the family home in October 2014, which the Defendant admits. There is no evidence of the spouses having reconciled after she removed.

[28] In attempting to persuade the court to grant the application for extension of time, Counsel Ms. Johnson submitted that the Claimant benefits from what Bertram-Linton J in **Herbert Reid v Michelle Neita Reid** [2016] JMSC Civ. 204 described as the “double panelled door”. This situation arises where a still married applicant who has filed a claim under PROSA which is in a state of suspended validity is able to rely on another section 13(1) trigger, such as the grant of a decree of dissolution of a marriage after the claim was filed. That it is possible for an applicant in an appropriate case to so benefit is beyond doubt, but the principle does not assist the Claimant in the circumstances of the instant case. I am

therefore unable to agree with Counsel's contention in written submissions filed 7th October 2019 that the "...*the Claimant or her estate could refile the Fixed Date Claim Form within twelve (12) months of the granting of the Decree Absolute*", which if true, could reduce significantly the potency of the Defendant's objection to the application for extension of time.

[29] In **Derrick Woodburn Gentles (Executor of the Estate of Beverly Carr) v Kenneth Carr** [2019] JMCA Civ 31 on which the Claimant relies, the Carr's marriage was terminated by the death of Mrs. Carr on 1st November 2014. She died testate and had left Mr. Carr a life interest in property that was said to be the family home, with the remainder to other beneficiaries. On the 7th March 2016 Mr. Carr filed a claim for one-half share in the family home. He subsequently passed away and on the 22nd May 2017 his attorney filed a notice of application for court orders seeking an extension of time to file an action under PROSA and for a Delroy King to be appointed to represent his estate. Both applications were granted and the decisions appealed. In granting the appeal by the Executor of Mrs. Carr's Estate, it was determined that the provisions of PROSA were inapplicable as the termination of marriage by the death of one spouse was not a trigger for an application for the division of property under the Act. Accordingly, Mr. Carr's claim was remitted to the Supreme Court to proceed as a common law claim.

[30] Edwards JA in the course of her judgment observed as follows:

[28] A full reading of section 13 shows that PROSA does not recognise any entitlement to apply for division of property after the termination of a marriage by the death of one spouse...

[30] Unfortunately, there is no provision in PROSA which allows an application for property to be vested in a surviving spouse after the death. (sic)...

[31] With respect to an application under section 11 of PROSA, this must be brought during the marriage or cohabitation, and an

application cannot be brought where the marriage is terminated by death...

[32] There is therefore no provision in PROSA which contemplates or accommodates an application by a surviving spouse after termination of marriage by death. It is clear, therefore, that section 6(2), which merely declares the entitlements to the family home, provides no exception to the general rule in section 3(1). It creates no special category of spouse to whom no other provision of PROSA need apply, once the entitlement is stated in section 6(2). Section 6 merely acts to preserve the entitlement of a surviving spouse who may have brought a claim and the death of his spouse intervened...

[31] It was stated in submissions by Counsel Ms. Johnson, which was not disputed by the defence, that a Decree Nisi was in fact granted in the divorce proceedings commenced in 2017. The date of the grant is stated in the Defendant's written submissions filed 16th October 2019 as 9th January 2019. In those circumstances and pursuant to CPR 76.14 (13), Mrs. Wright-Anderson's death operated to finalise the dissolution of the parties' marriage. On the authority of **Gentles v Carr** however, her death did not vest any right in her estate to commence a fresh claim for the division of property under PROSA. There is therefore no "double panelled door" which assists the Claimant in the bid for an extension of the time within which to make a claim under PROSA.

[32] The appropriate and only trigger in the circumstances of this case is the separation of the parties in October 2014. Over three (3) years would therefore have elapsed between the date of separation and the filing of the claim to which the application for extension of time relates. On any account, this is a long delay.

Reason for Delay

[33] A party wishing to have the court exercise its discretion to extend the time for filing claim for division of property under PROSA has an obligation to supply reasons for the failure to file the claim within the twelve (12) months

of the triggering event under the Act. This puts the court in a position to determine whether there is any good reason for depriving a defendant of the limitation defence which he is entitled to enjoy. In this regard reference may be made to the decisions in **Delkie Allen v Trevor Mesquita** [2011] JMCA Civ 36 and **Gentles v Carr** which was previously cited.

[34] It is contended in the written submissions filed 7th October 2019 that the Claimant's delay in making the application for a division of property within the twelve (12) months limited by PROSA was occasioned by the worsening health of Mrs. Wright-Anderson and the need to accumulate funds required to meet the expenses for bring the action in the Supreme Court. Before me Ms. Johnson argued that the Claimant discharged the obligation to provide a plausible explanation for the delay of over three (3) years in filing the claim. The evidence says otherwise.

[35] The Claimant's application is supported by affidavit sworn and filed by Mrs. Wright-Anderson's Guardian ad Litem on the 30th October 2019. He avers as follows at paragraph 6.

The reason for the delay in making the application is that my daughter was coping with considerable health challenges during the last years of her life and when Ms. Johnson contacted her in July 2019 about making the application for extension of time, she just could not find a convenient time to provide instructions as she was undergoing treatment for her illness and had many demands on her at her place of employment, as she had to make up for work she had not done because of her illness and her absence from work.

[36] There is no reference in the affidavit to financial difficulty as submitted by Counsel, nor is any reason given for the delay of over three (3) years between the date of separation in October 2014 and the filing of the claim in June 2018. That is the delay which the Claimant is required to explain. I do not doubt Mr. Anderson's averment that his daughter was suffering from health challenges during the "latter years of her life", which phrase could include the period from October 2014 to June 2018 and contra wise. I observe however that during the last year and two (2) months of her life

she filed documents commencing this claim on the 26th June 2018 and that she also swore and filed a further affidavit on 14th June 2019. The latter affidavit was among the documents in the Judge's Bundle filed 26th May 2021. It was accompanied by an affidavit sworn by Counsel Ms. Johnson, filed 19th July 2019 where she avers that she had taken instructions from Mrs. Wright Anderson for a further affidavit some time after 1st May 2019 and that Mrs. Wright-Anderson was not available to sign the same until the afternoon of 13th June 2019. There appears to have been, in my view, sufficient opportunity to properly explain the reason for delay in filing of the division of property claim prior to Mrs. Wright-Anderson's passing.

- [37] In these premises, I am unable to find that delay of over three (3) years in commencing the claim has been explained sufficiently or at all. As may be likely on many applications for extension of time after the death of a claimant, the availability of admissible evidence to explain the delay in commencing the claim might present a particular challenge to the person appointed to continue proceedings.

Prejudice & Prima Facie Meritorious Claim

- [38] Pursuant to section 4 of PROSA, where the Act applies, its provisions take effect in the place of the rules and presumptions of both common law and equity, to the extent that they are applicable to transactions between spouses and each of them as well as third parties.
- [39] In respect of applications for the division of property under section 13, section 14(1) prescribes how property is to be divided. It states,

Where under section 13 a spouse applies to the Court for a division of property the Court may –

- (a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require;*
or

(b) subject to section 17 (2), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection (2),

or, where the circumstances so warrant, take action under both paragraphs (a) and (b).

- [40]** The factors for consideration at section 14(2) are the parties' contribution, whether financial or otherwise, whether directly or indirectly made on behalf of each spouse to the acquisition, conservation or improvement of the property; that there is no family home; the duration of the marriage or period of cohabitation as appropriate; the existence of an agreement with respect to the ownership and division of property; and other facts and circumstances which the court believes is to be taken into account as the justice of the case requires. Section 14 (4) goes on to provide "*[t]hat for the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution.*"
- [41]** The Division of other property is also subject to the provisions of section 17 (2) which prescribes that the value of property which may be divided between spouses is to be ascertained by deducting from the value of property owned by each spouse such debts as are specified in the section. Where a secured or unsecured personal debt of one spouse is paid out of property which is owned by both spouses, the court may order, on a division of the property, that the share of the other spouse in the property is to be increased proportionally or that the spouse is to pay compensation to the other: section 17(3).
- [42]** It is the Defendant's contention that he will be prejudiced if an extension of time is granted for making a section 13 claim as the properties which are the subject of the claim were jointly owned, and that at the time of Mrs. Wright-Anderson's death, the interest in those properties passed entirely to him as the surviving joint tenant in the absence of severance of the joint tenancies. The evidence does not support the contention that there was no severance and I am therefore unable to agree with submission as to prejudice on this particular basis.

- [43] Page Wood V-C in **Williams v Hensman** (1861) 1 J. & H. 546, which applies in this jurisdiction, set out the ways in which a joint tenancy can be severed thus.

A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund - losing, of course, at the same time, his own right of survivor-ship. Secondly, a joint-tenancy may be served by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested.

[Emphasis added]

- [44] That pronouncement was relied on **In Re Draper's Conveyance Nihan v Porter and Another** [1969] 1 Ch. 486, which the Claimant urged on the court. In that case it was found that the issuing of a summons and supporting affidavit by a wife during her husband's lifetime, asking for an order that the house which was jointly held by them be sold and proceeds of sale distributed in accordance with their respective interests, showed an intention which was inconsistent with the continuation of the joint tenancy. The initiation of court proceedings for the division of the property was therefore regarded as severance of the beneficial joint tenancy during her husband's lifetime and not the order of the court.
- [45] Mrs. Wright-Anderson filed the instant claim and a supporting affidavit on 26th June 2018. Among other relief which are not necessary to repeat here, she sought a declaration that she is entitled to 50% interest in the land registered in the joint names of the parties at Volume 967 Folio 199

of the Register Book of Titles, which the parties agree is the family home; 100% of property in St. Thomas registered at Volume 1043 Folio 538 of the Register Book of Titles, also in the joint names of the parties; and an order that the Defendant effects transfer of Honda Civic registered 7426 which was also in the joint names of the parties to her '*solely and beneficially*'. In respect of the family home, the Defendant in his affidavit filed 9th August 2019, before Mrs. Wright-Anderson's death, asks that it be divided equally between the parties; that the Honda Civic be sold with 70% of the sale proceeds going to him and 30% to the Claimant as he had responsibility for the loan which was used to acquire it; and that he be declared entitled to 80% interest in the property in St. Thomas and a 20% interest be declared for the Claimant on account of her financial contribution to its initial purchase.

[46] Mrs. Wright-Anderson filed and served her claim and affidavit on the Defendant before her death. The contents of those documents demonstrated that she had no intention to continue the joint tenancy in respect of the family home, the property in St. Thomas and the Honda Civic. On the above cited authorities, this appears to be a sufficient act of one joint tenant operating on her own share to create severance of that share in the properties. The Defendant also asked for various relief inconsistent with an intention to continue the joint tenancies in these proceedings before Mrs. Wright-Anderson's death.

[47] In respect of the family home, the parties during Mrs. Wright-Anderson's lifetime asked that it be shared equally and for consequentially orders be made to enable each party to realise their share. This accords with the presumption in respect of division of the family home under PROSA and I cannot foresee any prejudice to the Defendant in this regard if the time was extended for filing a section 13 claim.

[48] Additionally, the Defendant submits that pursuant to section 6(2) of PROSA, the marriage having terminated on Mrs. Wright-Anderson's death, the family home for which they are registered as joint tenants passed to him exclusively. This is on account that the equal share rule at

section 6(1) is made subject to section 6 (2) which states, “(e)xcept where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one half share of the family home.” This provision could only avail the Defendant if the Claimant’s application for extension of time is granted. If the Defendant’s contention that the joint tenancy was not severed prior to the termination of the marriage by death could be maintained, it appears to me that he would suffer no prejudice in respect of the family home if I exercised the discretion to extend time for filing a claim under PROSA.

- [49] There is property other than the family home however. Under PROSA, the court in dividing such property is permitted to consider the financial and non-financial contributions of the parties and by operation of section 14 (4), there is no presumption that monetary contribution is of greater value than non-monetary contributions.
- [50] In respect of the St. Thomas property and the Honda Civic, the Defendant in defence of the claim clearly relies on what he says is the parties’ respective financial contributions to their acquisition. It is on the value of those alleged contributions that he asks that the parties’ share in the properties be divided.
- [51] Under PROSA, while the court is permitted to consider financial as well as non-financial contributions to the acquisition of property other than the family home, in determining their division, there is “... *no presumption that a monetary contribution is of greater value than a non-monetary contribution.*” On the other hand, where property division is to be settled by the rules of common law or equity, it is open to the Defendant to argue that the parties’ respective financial contributions to property acquisition ought to determine their respective shares as he has pleaded.
- [52] In those circumstances, in determining whether the Defendant would be prejudiced by an extension of the time for bringing a PROSA claim for division of property, I also have regard to the fact that the Claimant’s

application was only made on the day fixed for the hearing of the claim, and after the Defendant had filed his affidavit evidence in response to it and submissions invoking the limitation defence provided by PROSA.

[53] In these premises, it is my judgment that it would be prejudicial to the Defendant to grant the Claimant's application for extension of time as he would effectively be deprived of the limitation defence provided at section 13(2) at a very late stage in the proceedings, certainly as it relates to the division of property other than the family home. Accordingly, I find that the application for an extension of time should not be allowed.

[54] On the basis of my earlier conclusion that Mrs. Wright-Anderson had taken steps during her lifetime and during the subsistence of the parties' marriage, which were inconsistent with the continuation of a joint tenancy or joint ownership of the disputed properties, I find that the claim is prima facie meritorious.

[55] Outside of a section 13 PROSA claim, it was competent to her to make a claim under section 11 for which there is no limitation save that the relief provided there is applied for during the subsistence of the parties' marriage. The parties' marriage was terminated on the death of Mrs. Wright-Anderson which the filing of the Fixed Date Claim Form and the evidence in support preceded. The Claimant could also have applied under the Partition Act for severance or ask that property division be settled by the rules of common law or equity. With these options available to the Claimant, there is no basis for concluding that the Fixed Date Claim Form fails to disclose any reasonable ground for bringing a claim to warrant it being struck out as sought by the Defendant.

ORDERS

[56] On the Defendant's Notice of Application for Court Orders filed 11th October 2019:

1. The application is refused.

2. Costs to the Claimant to be taxed if not sooner agreed.
3. The Defendant's Attorney-at-Law to prepare, file and serve this order.

[57] On the Claimant's Notice of Application for Court Orders filed 30th October 2019:

1. The application to extend the time within which to file a claim for the division of property under section 13 of PROSA is refused.
2. The application to strike out the Defendant's affidavit in response to the claim is refused.
3. The Defendant's Affidavit filed in response to the claim on the 9th August 2019 is permitted to stand as duly filed and served.
4. The Claimant is to pay half of the Defendant's costs on the application, which costs are to be taxed if not sooner agreed.
5. The Claimant's Attorneys-at-Law are to prepare, file and serve this order.

[58] It is also further ordered that:

1. A Case Management Conference is fixed for the 22nd November 2021 at 2:00 p.m. for thirty (30) minutes.
2. By the Court, the parties are referred to mediation.
3. The Claimant's Attorneys-at-Law are to prepare, file and serve this order.

**Carole Barnaby
Puisne Judge**