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**IN THE FAMILY COURT
AT CHRISTCHURCH**

**FAM-2014-009-001284
[2016] NZFC 3048**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	KA-SUN LEE (AKA) GLORIA LEE Applicant
AND	JEFFREY GEORGE THOMPSON Respondent

Hearing: 14 April 2016

Appearances: P Allan on behalf of I Sirisena for the Applicant
S van Bohemen for the Respondent

Judgment: 14 April 2016

ORAL JUDGMENT OF JUDGE J J MORAN

[1] In August 2004 Miss Lee filed an application for orders under the Property (Relationships) Act 1976. The respondent, Dr Thompson filed a notice of appearance under protest to jurisdiction under r 43(1) Family Courts Rules 2002 and Miss Lee then applied pursuant to r 43(5) to set aside the appearance under protest.

[2] In addition to that interlocutory application which was set down for hearing today, so too was an application by Miss Lee to have time extended for filing her proceedings as they were filed outside of the three year limitation period imposed under the Act. That application is opposed by Dr Thompson.

[3] I indicated to counsel at the outset that I did not consider that r 43 was an appropriate mechanism by which there could be a determination of strongly disputed facts. In this case, the dispute is between Miss Lee's view that the relationship extended from early 2006 until separation in early 2011 whereas Dr Thompson says it was from July 2010 to January 2011.

[4] I have decided that it is appropriate in this case to deal firstly with the application for leave and I have given the parties time to continue some negotiations this morning but they have been unsuccessful in resolving matters.

[5] Clearly if the application for leave is not granted, then that will end the proceedings. If it is granted, then I will deal with the issue of the protest and how that might progress.

[6] Section 24 Property (Relationships) Act 1976 sets out the time limits for making application and states that an application made after an order has been made declaring a marriage void or ab initio is to be made 12 months after the date of the order, but for a de facto relationship it must be made no later than three years after it has ended.

[7] Section 24 (2) says that regardless of subs (1), the Court may extend the time for making an application after hearing the applicant and any other persons who would have an interest in the property that would be affected by the order sought and

who the Court considers should be heard. The Court's power under the section extends to cases where the time limit has already expired.

[8] There are a number of High Court and Court of Appeal authorities on this matter and I have had regard to them and in particular, the cases of *West v Perry* [2002] NZFLR 796 and *Ritchie v Ritchie* [1992] NZFLR 226. What is clear from those decisions is that while there is no onus, there is an obligation on an applicant seeking the extension to advance evidence to support it.

[9] The criteria for considering whether leave should be granted are well established. They include the following relevant factors:

- (i) The length of time between the expiry of the statutory time frame and the bringing of the application.
- (ii) The adequacy of the explanation offered for the delay with emphasis on the real reason for the delay rather than that advanced.
- (iii) The merits of the case.
- (iv) The prejudice to the respondent.
- (v) The overriding consideration must, however, be the interests of justice.

Delay

[10] Looking firstly at the issue of delay. In this case Miss Lee says the delay in filing proceedings was a period of some three months. It is her evidence that the relationship between she and Dr Thomson ended in April 2011 and that they had been together since late 2005, early 2006.

[11] Dr Thompson says that the delay was about six months after statutory timeframe had expired, as he and Miss Lee were together from July 2010 to January 2011.

Explanation for delay

[12] While all cases must be considered on their merits, in itself a delay of that period is not fatal. The real issue is whether Ms Lee is able to provide a satisfactory explanation for it.

[13] Firstly, Miss Lee says that she was suffering from clinical depression and that it continues to this day. Mr Allan submits that the Court can have regard to the fact that people who are depressed often find it difficult to take effective steps in their daily lives and that extends to instructing counsel and issuing proceedings.

[14] For Dr Thompson, Mr van Bohemen submits that it would have been a simple task for Miss Lee to provide evidence to corroborate her assertion that she suffered from depression and that it impacted on her ability to function properly and to issue proceedings within a three year time frame. She has chosen not to adduce evidence and therefore has failed in her obligation to satisfy the Court. In response, Mr Allan said that Dr Thompson had not taken issue with his client's assertion and therefore the Court should accept it.

[15] In my view, there is a clear obligation on Miss Lee to establish the assertion and it would have been simple for her to do so. She says that she suffered from depression following the separation but she has provided no evidence of this and certainly no evidence that even if she were depressed, it was at any level that would have impacted on her functioning for a period in excess of three years which in itself is substantial.

[16] Further, she says that near the end of the three year period following her separation, she was "unwell" for three months and was hospitalised but provides absolutely no detail. Miss Lee could have provided evidence of her hospitalisation; the nature of the illness and especially whether it was ongoing depressive illness. She has not done so. The statements in themselves are in my view, far from

adequate in terms of explaining not only the delay after the time for filing proceedings was reached, but also the three years that she had from the time of separation until that time. She says through her counsel that she had instructed her own lawyer, Ms Sirisena and that attempts to follow up through non judicial process had been pursued and that a number of letters had been sent but that Dr Thompson did not respond and denies receipt of them. That submission too, requires closer examination.

[17] It is clear from the evidence on the file that Ms Sirisena wrote two letters to Dr Thompson and they were dated 2 December 2013 and 28 April 2014 respectively. The first letter, therefore, sent almost three years after the parties had separated and the second letter certainly after that time. On Dr Thompson's evidence it was after they had been apart for three years and for Miss Lee, it was close to that time.

[18] Therefore, I do not accept that there was any active attempt to follow up through non judicial process. There was at best two letters sent at the end of the period when the parties had already been apart for three years.

[19] Dr Thompson's evidence was that Miss Lee sent him three texts immediately following their separation saying that she was going to take him to Court for a share of the property and he did not respond. He said there was nothing further received. Clearly if that is the case, and it was not contended that it was not, then Miss Lee was mindful of resolution of property following separation, but it took more than three years for her to action it. She had ample opportunity to instruct counsel in the intervening period.

Merits of the case

[20] The next issue is the merits of the case. I am very mindful in considering this, that there is relatively limited information on the file because Dr Thompson has filed an appearance to protest to jurisdiction. He has not filed an MP1 affidavit of assets and liabilities, but he has filed a narrative affidavit.

[21] On the evidence before me and certainly on the evidence adduced by Miss Lee, the property in dispute is the family home at [address deleted], and Dr Thompson's medical practice known as the Waltham Medical Centre Limited.

[22] Mr Allen submits that Miss Lee provided her rental home, at her expense, for the period from 2006 through to 2010 and that enabled Dr Thompson to utilise relationship property funds and that she is, therefore, entitled to share in whatever he may have used those funds for, whether it be shares or investments. There is no evidence of such shares or investments but Mr Allan says that in the absence of directions that Dr Thompson file further documents, it would be unfair and risky to assume that they do not exist. That very general submission does not advance Miss Lee's application.

[23] Putting that submission to one side, I look at just what property that the parties had during the relationship, taking it on Miss Lee's best case scenario. From 2005 when the parties commenced a friendship/relationship until July 2010, they maintained their own properties and in fact both of them moved homes during that time and both were renting. They did not share one common residence. Dr Thompson acknowledges spending nights with Miss Lee at her home but there is no evidence whatsoever that they intermingled finances or that Miss Lee financially provided for Dr Thompson. The evidence indicates that he had some meals at her home, and that he took the family out for meals from time to time. Dr Thompson supported his home and Miss Lee hers. There is no real suggestion that it was otherwise.

[24] The property at [address deleted] was acquired by Dr Thompson in 2009 as part of a settlement with his former spouse. He acquired her interest in that property and it was transferred at that point to a family trust as part of a succession planning exercise. Whether the latter is contentious or not, the reality is that the parties did not use Dr Thompson's property for another year. There is no evidence that Miss Lee even stayed there. There is no contention that Miss Lee has a claim under ss 8, 44 or 44C. Accordingly, it is difficult, on a prima facie basis, to ascertain what claim Miss Lee might have to the property which was owned by a third party, namely a family trust.

[25] Certainly under s 44C any adjustments which could be made, have to be from a relationship property and it would not appear on the face of it to be any other property of that nature. There is no evidence that the settlement on a trust a year before the property was occupied by the parties was made in any way to defeat Miss Lee's entitlement. It was separate property transferred to a trust the time that Property (Relationship) Act 1976 proceedings were settled between Dr Thompson and his former spouse.

[26] In relation to Dr Thompson's medical practice, it is owned by a company and Dr Thompson's evidence is that he has owned 70 shares in that company since November 2001 and that the company acts as a vehicle for the doctors and other shareholders to operate the medical practice. The shareholding in the company is separate property. There is no evidence, even in the affidavits filed by Miss Lee, that she made any contribution, whether direct or indirect to sustain or increase the value of that shareholding and accordingly, there is on the face of it no interest which she could have.

[27] The undisputed relationship property which the parties have are their chattels and it seems that they were divided on separation. When Miss Lee left the home, she took chattels together with cash of some \$5000 which Dr Thompson provided her with to assist her in setting up a home and obtaining rental accommodation. Miss Lee is not suggesting also that she has any property which falls for division under the Act.

Serious injustice

[28] The next issue to determine is whether there would be a serious injustice to Dr Thompson if leave were granted. Mr van Bohemen says that his client has been trying since proceedings were served in August 2014 to resolve these matters, that it has become a very stressful and expensive exercise. Dr Thompson is not legally aided, but Miss Lee is and Mr van Bohemen submits that even if he obtained an order for costs against Miss Lee, it is unlikely that she would be in any position to meet it. He says that five years after separation serious injustice would result if leave is granted.

[29] For Miss Lee, Mr Allan says that it is contrary to the interests of justice for her to be precluded from pursuing a claim and from determining whether there are assets available for division.

[30] I am very mindful of the provisions of s 1N of the Act which provides not only for justice to be served between the parties, but for there to be a quick and expeditious resolution of matters between them.

[31] I have carefully balanced all of the factors. I find that Miss Lee has failed to provide a satisfactory explanation for the delay and while that delay is not great, coupled with the absence of any merit on a prima facie basis to her application, she has not satisfied me that leave should be granted.

[32] Accordingly, her application is refused and that brings these proceedings to an end.

J J Moran
Family Court Judge