

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE

<https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/>

**IN THE FAMILY COURT
AT NEW PLYMOUTH**

**I TE KŌTI WHĀNAU
KI NGĀMOTU**

**FAM-2020-043-000370
[2021] NZFC 6419**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	SHERYL LOUISE CURSONS Applicant
AND	SCOTT CHAMBERLAIN SHELLEY LOWNDES Respondents as Executors of the Estate of C D Bell

Hearing: 10 May 2021

Appearances: S Hughes QC for the Applicant
J Long and J Grimmer for the Respondents

Judgment: 6 July 2021

JUDGMENT OF JUDGE L HARRISON

Introduction

[1] The applicant issued proceedings under the Property (Relationships) Act 1976 (“the Act”) on 19 October 2020. She filed an application for division of relationship property, an application pursuant to s 24 to enlarge time for the making of an

application and a notice of choice of option under s 61 of the Act, electing option A to make an application under the Act for the division of relationship property.

[2] The applicant was in a de facto relationship with Christopher David Bell from approximately January 2000 until either late 2014 or mid-2015. Mr Bell died by [details deleted] in New Plymouth on 5 July 2020.

[3] The application for leave is opposed by the respondents who are the executors of the Estate of C D Bell.

[4] A submissions only hearing took place on 10 May 2021 to determine the application for leave.

The law

[5] The relevant statutory provisions of the Act are ss 24, 89 and 90.

[6] Pursuant to s 24:

24 Time limits for making applications

- (1) The following time limits apply in relation to applications made under this Act:
 - (a) an application made after a marriage or civil union has been dissolved by an order dissolving the marriage or civil union must be made before the expiry of the period of 12 months after the date on which that order takes effect as a final order:
 - (b) an application made after an order has been made declaring a marriage or civil union to be void *ab initio* must be made before the expiry of the period of 12 months after the date of the making of the order:
 - (c) an application made after a de facto relationship has ended must be made no later than 3 years after the de facto relationship ended.
- (2) Regardless of subsection (1), the court may extend the time for making an application after hearing—
 - (a) the applicant; and

- (b) 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.
- (3) The court's power under this section extends to cases where the time for applying has already expired.
- (4) If one of the spouses or partners has died, the application of this section is modified by section 89 (except in a situation described in section 10D(1)).

[7] Under Part 8 of the Act, s 89 provides:

89 Time for commencement of proceedings

- (1) Proceedings may be commenced after the death of one of the spouses or partners if,—
 - (a) at the date of the death of the deceased spouse or partner, the spouses or partners are living together; or
 - (b) in the case of de facto partners, at the date of the death of the deceased de facto partner, the de facto partners are not living together; or
 - (c) in the case of spouses or civil union partners, at the date of the death of the deceased spouse or civil union partner the following circumstances exist:
 - (i) the spouses or civil union partners are not living together; and
 - (ii) the marriage or civil union has not been dissolved by an order dissolving the marriage or civil union, and an order has not been made declaring the marriage or civil union to be void *ab initio*; or
 - (d) in the case of spouses or civil union partners, at the date of the death of the deceased spouse or civil union partner the following circumstances exist:
 - (i) the spouses or civil union partners are not living together; and
 - (ii) the marriage or civil union has been dissolved by an order dissolving the marriage or civil union, or an order declaring the marriage or civil union to be void *ab initio* has been made; and
 - (iii) not more than 12 months have elapsed since the taking effect as a final order of the order dissolving the marriage or civil union or the date of the making of the order declaring the marriage or civil union to be void *ab initio*; or

- (e) in the case of spouses or civil union partners, at the date of the death of the deceased spouse or civil union partner the following circumstances exist:
 - (i) the spouses or civil union partners are not living together; and
 - (ii) the marriage or civil union has been dissolved by an order dissolving the marriage or civil union, or an order declaring the marriage or civil union to be void *ab initio* has been made; and
 - (iii) more than 12 months have elapsed since the taking effect as a final order of the order dissolving the marriage or civil union or the date of the making of the order declaring the marriage or civil union to be void *ab initio*, but, either before or after the deceased spouse's or civil union partner's death, the court grants an extension under section 24(2).
- (2) The court's power to grant an extension under section 24(2) extends to cases where the time for making an application expired before the commencement, on 1 February 2002, of the Property (Relationships) Amendment Act 2001.

[8] Section 90 provides:

90 Time limits for commencing proceedings

- (1) Proceedings must be commenced within the following time limits:
 - (a) if the estate of the deceased spouse or partner is a small estate (as defined in section 2), the proceedings must be commenced—
 - (i) no later than 12 months after the date of the death of the deceased spouse or partner; or
 - (ii) if administration of the estate is granted in New Zealand within that period, no later than 12 months after the grant of administration,—whichever is the later:
 - (b) in any other case, the proceedings must be commenced no later than 12 months after administration of the estate of the deceased spouse or partner is granted in New Zealand.
- (2) Regardless of subsection (1), but subject to subsection (3), the court may extend the time for commencing proceedings after hearing—
 - (a) the applicant; and

- (b) any other persons who have an interest in the property that would be affected by the order sought and who the court considers should be heard.
- (3) The court's power under this section extends to cases where the time for commencing proceedings has already expired, including cases where it expired before the commencement, on 1 February 2002, of the Property (Relationships) Amendment Act 2001.
- (4) The court may not grant an extension of time under subsection (2) unless the application for the extension is made before the final distribution of the estate of the deceased spouse or partner.

[9] On the face of it there is an inconsistency between ss 24 and 89.

[10] Ellis J in *McConkey v Clarke* had this to say about the inconsistency:¹

... In my view, the interplay between s 24 and ss 89 and 90 simply means that pt 8 proceedings can be commenced by someone who has been in a de facto relationship even if he or she had ceased living with her partner at the time of the partner's death, *provided* (a) he or she was living with the partner within three years of his or her death (subject to any extension of that time by the Court) *and* (b) the time limits in s 90 are met. To the extent there is any real conflict between s 24 and s 90 it is a simple case of the specific overriding the general. The very specific point of the time limits in pt 8 (and, in particular, the point of the date of final distribution being the final cut off point) would be defeated if those contained in s 24 were to prevail.

[11] When I apply *McConkey v Clarke* to the present case, I find that:

- (a) Ms Cursons was in a de facto relationship with Mr Bell;
- (b) Their relationship had ceased at the time of his death;
- (c) Ms Cursons was not living with Mr Bell within three years of his death but, subject to an extension of time being granted, this requirement is overcome; and
- (d) The assets of the estate have not been distributed. The proceedings have been issued within 12 months of the administration of the estate being granted.

¹ *McConkey v Clarke* [2019] NZHC 924, [2019] NZFLR 170 at [73].

[12] Counsel for both parties have referred to the four relevant factors in deciding whether to grant an extension as articulated by McMullin J in *Beuker v Beuker*.² They have also referred to *Ritchie v Ritchie* where Anderson J warned against seeing the four factors as a comprehensive code and emphasised that weight given to each will depend on the facts of the case.³ For clarity, the four factors are:

- (a) the length of time which has elapsed between the expiry of the time limit and the bringing of the application;
- (b) the adequacy of the explanation provided for the delay;
- (c) the merits of the case; and
- (d) prejudice to the respondent.

Analysis

Background to the relationship

[13] In setting out this background I am cognisant of the fact that Mr Bell is not present and able to give evidence. From the affidavits filed by the applicant and witnesses for both parties, I glean the following history.

[14] The parties commenced their relationship in 2000 at a time when they were co-workers doing seismic surveys in Taranaki. They lived together for approximately 15 years.

[15] From around November 2005 Mr Bell held positions such as a field project manager and an operations manager for seismic oil and gas exploration. He worked overseas in countries such as Papua New Guinea and Malaysia on a month-on month-off basis, extending to a three month off period in the wet season.

[16] There are no children of the relationship.

² *Beuker v Beuker* (1977) 1 MPC 20 (SC) at [21].

³ *Ritchie v Ritchie* (1991) 8 FRNZ 197 (HC) at 199.

[17] Both parties smoked marijuana. Mr Bell is described as a heavy marijuana smoker and grew his own marijuana under the house. He became increasingly paranoid towards the end of the relationship, and even more so later in his life.⁴

[18] The applicant describes Mr Bell's increasingly reclusive behaviour being entirely due to him consuming very large quantities of marijuana when he was home from his overseas work and becoming very paranoid.

Length of time elapsed between expiry of time limit fixed by statute and bringing the application

[19] Under s 24 of the Act, an application for division of relationship property must be made no later than three years after the relationship ended.

[20] The actual date that the relationship ended is unclear. It is either late 2014 or July 2015.

[21] If the relationship ended in late 2014, the three year statutory time period expired in late 2017. Given the application was filed in October 2020, the delay amounts to approximately three years.

[22] If the relationship ended in July 2015, the three year statutory time period expired in July 2018. Given the filing of documents in October 2020, the delay comes to two years and three months.

[23] Anderson J in *Ritchie v Ritchie* cautioned against placing undue weight on the length of time between the expiry of the time limit and the bringing of the application.⁵ He did note however that the longer delay the greater the likelihood of an injustice arising to a respondent.

[24] Each case must be decided on its own facts. Extensions have been granted despite delays of up to 15 years.

⁴ Affidavit of S Down for Respondent, paragraph 21.

⁵ *Ritchie v Ritchie*, above n 3, at 200.

[25] Anderson J also noted that the real reason for the delay, as compared to the reason advanced by the party applying for an extension, is the proper concern of the court.⁶

[26] The evidence before the Court from the applicant and her witnesses attest to an unhappy relationship, a dominant and overbearing and paranoid partner, and the applicant having a sense of powerlessness.

[27] Following the end of the relationship they agreed that Mr Bell would acquire Ms Cursons' interest in [address deleted – the family home], New Plymouth.

[28] In September 2015, Mr Bell and Ms Cursons signed a statement in front of a registered legal executive with RMY Legal, Mr Bell's lawyers. The statement jointly acknowledged that neither Mr Bell nor Ms Cursons had sought any legal advice as to how the Property (Relationships) Act 1976 affected the status, ownership and division of property owned by them. Despite the clear advice given to both parties by RMY Legal that they should both seek independent legal advice; they chose to ignore this advice.

[29] Furthermore, the parties acknowledge that they are both satisfied that non-compliance pursuant to s 21A has not materially prejudiced their respective interests. They were settling their differences, in particular their agreement as to status, ownership and division of their property.

[30] RMY Legal were provided with joint instructions to complete the transfer of [the family home], New Plymouth. Accordingly the applicant received \$175,000 from Mr Bell, this being a one-half share of the quotable value of the family home, and in exchange he acquired Ms Cursons' interest in the property.

[31] Within a short time of receiving her settlement monies the applicant had purchased a new home and had married her new partner.

⁶ At 200.

[32] Following their “settlement”, and up to the time of his death, the applicant took no steps, nor did she file any proceedings under the Property (Relationships) Act, to revisit the terms of their agreement.

[33] However, with Mr Bell’s passing, his death created the space for the applicant to pursue a just division of relationship property. The relationship property pool was not limited to [the family home].

[34] Delay is inextricably linked to the timing of Mr Bell’s death.

[35] I am persuaded, particularly by the dynamics of their relationship, that the applicant chose the path of least resistance on separation and received what Mr Bell was prepared to offer, and got on with her life.

The merits of the case

[36] The sole beneficiary of Mr Bell’s estate is a charitable trust.

[37] The charitable trust is not represented in these proceedings. However, the executors take the position they are obliged to carry out the testator’s intentions under a will, hence their opposition to a distribution to anyone other than the named sole beneficiary.

[38] The statement signed by the parties before the legal executive at RMY Legal does not record the assets and liabilities of the relationship, nor does it record any separate or jointly owned property.

[39] However, there is evidence that [the family home] was not the only item of relationship property available for division in 2015.

[40] On the face of it, the applicant received less than her entitlement by law to the relationship property in the context of a 15 year relationship.

[41] There is merit to grant leave given she has been materially disadvantaged by the “agreement.” Conversely, her disadvantage has been an advantage for the estate.

Prejudice to the respondent

[42] Part 8 of the Act deals with the division of property where one spouse or partner dies. Sections 55 to 95 are included in Part 8.

[43] Under s 81(1), all the property that was owned by the deceased spouse or partner at his or her death is presumed, in the absence of evidence to the contrary, to be relationship property.

[44] Section 81(2) states that a person who asserts that any property to which the presumption in subs (1) applies is not relationship property has the burden of proving that assertion.

[45] The argument advanced on behalf of the executors is that the burden falls on their shoulders should they assert that any of the estate property is not relationship property and that this a difficult burden to bear because Mr Bell is deceased.

[46] The exercise of rebutting the presumption is also made difficult for the executors given the length of time since the relationship ended, approximately six years.

[47] On behalf of the applicant it was submitted that the applicant is not seeking all of the estate assets. Her entitlement would be a one-half share with an adjustment for the relationship property that she has in her ownership, possession or control.

Conclusion

[48] The payment from Mr Bell to the applicant of \$175,000 represented a one-half share of the quotable value of the family home. It did not represent the applicant's full entitlement under the Act.

[49] I accept the applicant's reason for taking what was offered, as opposed to pursuing her lawful entitlement, given the dynamics within the relationship which were made more difficult by Mr Bell's paranoia and his dominant and overbearing personality.

[50] I accept the reason for the delay in filing proceedings under the Act.

[51] The property of the estate comprises, at least in part, items of relationship property that are identifiable from the date of separation.

[52] The sole beneficiary is a charitable trust, as opposed to a close family member of Mr Bell.

[53] The applicant is not seeking all of the property of the estate, rather she is seeking a one-half share of relationship property held by the estate executors.

Outcome

[54] The applicant is granted leave to apply for orders under s 24(2) of the Relationship (Property) Act 1976.

[55] If there is an issue as to costs, or if the parties are unable to agree upon costs relevant to this application, then costs submissions are to be filed contemporaneously within 21 days of receipt of this decision.

Judge L Harrison
Family Court Judge

Date of authentication: 06/07/2021
In an electronic form, authenticated electronically.