

ANGUILLA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CALIM NO. AXAHMT 2011/0005

BETWEEN:

FRANCISCA JOLLY

Petitioner

And

SYLVESTER JOLLY

Respondent

Appearances:

Mr. Valencia Hodge for the Petitioner

The Respondent not being present and not being represented

2011: July 26

JUDGMENT

- [1] **FAY, J (Ag):** I will deal with the facts of this matter briefly. The parties were married on 6 August 2005 at Gallows Point, St John in the United States Virgin Islands. After the marriage, they lived together in the United States Virgin Islands. However, the marriage was not a success and the parties have lived separately and apart for a continuous period of more than 5 years since the presentation of the petition in this matter on 7 February 2011. There are no children of the marriage. The Petitioner lives in Anguilla where she is employed as a Registered Nurse. Her petition states that she is domiciled in Anguilla and that she has habitually been a resident of Anguilla during the year immediately prior to the presentation of the petition. I allowed an amendment to the petition to assert that the Petitioner has been ordinarily resident in Anguilla for more than 3 years. The Respondent is not resident in Anguilla. He has never been ordinarily resident or domiciled in Anguilla.
- [2]] I heard evidence from the Petitioner and am satisfied that everything that she told me was true. The evidence from the Petitioner was sufficient to make out a case for this Court to exercise its jurisdiction under the Matrimonial Proceedings and Property Act to make an Order Nisi if I can be satisfied that there is jurisdiction for the Court to make such an order in this matter.

[3] Mr. Hodge, counsel for the Petitioner, accepts that the usual jurisdiction of this Court in divorce matters arises from the jurisdiction of the husband. Thus in the ordinary course:

- (a) if the husband is domiciled in Anguilla, the Court has jurisdiction;
- (b) if the husband is not domiciled in Anguilla, the Court does not ordinarily have jurisdiction.

The exception to the general rule arises in cases to which section 19 of the Matrimonial Proceedings and Property Act ("the Anguillan Act") applies.

[4] Section 19 is captioned "*Additional jurisdiction in proceedings by a wife*" and provides as follows:

(1) *Without prejudice to any jurisdiction exercisable by the Court apart from this section, the Court shall have jurisdiction to entertain proceedings by a wife, notwithstanding that the husband is not domiciled in Anguilla –*

(a) *In the case of any proceedings under this Act (other than proceedings under section 15 or sections 37 to 42), if –*

- (i) *The wife has been deserted by her husband, or*
- (ii) *The husband has been deported from Anguilla under any law for the time being in force relating to deportation,*

And the husband was immediately before the desertion or deportation domiciled in Anguilla; and

(b) *In the case of proceedings for divorce or nullity of marriage, if the wife is resident in Anguilla and has been ordinarily resident there for a period of 3 years immediately preceding the commencement of the proceedings.*

(2) *In any proceedings in which the Court has jurisdiction by virtue of subsection (1), the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in Anguilla at the time of the proceedings.*

[5] In this matter, the Respondent was never domiciled in Anguilla so the Petitioner cannot rely on section 19(1)(a). However, the Petitioner has been ordinarily resident in Anguilla for a period of more than 3 years immediately preceding the commencement of the proceedings. In the circumstances, the Petitioner falls within section 19(1)(b).

[6] The question that I have to consider is whether the use of the word "and" at the end of subsection 19(1)(a) is conjunctive or disjunctive – in other words; does the use of that word mean that in the case of proceedings for divorce or nullity, the wife has to establish the requirements of both (a) and (b), or is it sufficient for her to just establish (a) or (b).

[7] Mr. Hodge submitted that the use of the word was disjunctive rather than conjunctive. He was unable to produce any authority to support that proposition, and informed me that there was no authority in Anguilla on the point. Mr. Hodge was not able to cite any authority from a similar section of the matrimonial laws of any other jurisdiction, not was he

able to cite any authority where the word "and" was used in a disjunctive rather than a conjunctive manner.

[8] I am satisfied that the word "and" can be used in a disjunctive rather than a conjunctive sense in certain circumstances - see e.g. *Re H* [1994] Fam 105. In determining how the word should be construed in section 19, I thought it appropriate to ascertain whether the particular wording of section 19 appeared in the matrimonial law of any other jurisdiction, and if it did so to look at any judicial decisions from such jurisdictions on the proper interpretation of the section. Unfortunately, whilst I was able to find provisions in St. Lucia and in England, that were similar to section 19, the word "and" did not appear at the end of the equivalent of subsection (1)(a) in those jurisdictions.

[9] There were provisions in the laws of England & Wales¹ which resembled section 19 of the Anguillan Act, although the law changed to a different regime in England in 1979. I propose to analyse the law as I understand it developed in England.

[10] Section 13 Matrimonial Causes Act 1937 (the "English MCA 1937") contained a section captioned *Jurisdiction under Part VII of the Principal Act in case of Husband's change of domicile* which is similar to section 19(1)(a) of the Anguillan Act. Section 13 of the English MCA 1937 provided that:

Where a wife has been deserted by her husband, or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England and Wales, the court shall have jurisdiction for the purpose of any proceedings under Part VIII of the principal Act, notwithstanding that the husband has changed his domicile since the desertion or deportation.

[11] There was no provision in the English MCA 1937 similar to section 19(1)(b) of the Anguillan Act.

[12] The law in England changed in 1950 with the introduction of the Matrimonial Causes Act 1950 (the "English MCA 1950"). Section 18 of the English MCA 1950 provided, under the caption *Additional Jurisdiction in proceedings by a wife* that:

(1) *without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to say -*

(a) *in the case of any proceedings under this Act other than proceedings for the presumption of death and dissolution of marriage, if the wife has been deserted by her husband, or the husband has been deported from the United Kingdom under any law for the time being in force in relation to the deportation of aliens [to deportation] and the husband was immediately before the desertion or deportation domiciled in England;*

¹ For the sake of convenience I will refer to the laws of England or English law.

(b) *in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.*

(2) *without prejudice to the jurisdiction of the court to entertain proceedings under section sixteen of this Act in cases where the petitioner is domiciled in England, the court shall by virtue of this section have jurisdiction to entertain any such proceedings by a wife if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.*

(3) *In any proceedings in which the court has jurisdiction by virtue of this section, the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings.*

[13] The new grounds introduced by sections 18(1)(b) and section 18(2) of the English MCA 1950 are somewhat similar, although not identical to, section 19(1)(b) of the Anguillian Act.

[14] It is interesting to note that subsections 18(1)(a) and (b) of the English MCA 1950 are not linked by the word "and", and that the body of section 18(1) contains the words "... *in any of the following cases ...*". In those circumstances, it is clear in my judgment that the jurisdiction arising under section 19(1)(a) is independent of the jurisdiction arising under section 19(1)(b) and vice versa. The further jurisdiction arising under section 19(2) is also independent of any jurisdiction arising under section 19(1).

[15] The law in England changed in 1965 with the introduction of the Matrimonial Causes Act 1950 (the "English MCA 1965"). Section 40 of the English MCA 1965 provided, under the caption *Additional Jurisdiction in proceedings by a wife* that:

(1) *without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall have jurisdiction to entertain proceedings by a wife, notwithstanding that her husband is not domiciled in England, -*

(a) *in the case of any proceedings under this Act (other than proceedings under section 14 or sections 23 to 28)[or under the Nullity of Marriage Act 1971], if*

(i) *the wife has been deserted by her husband, or*

(ii) *the husband has been deported from the United Kingdom under any law for the time being in force relating to deportation,*

and the husband was immediately before the desertion or deportation domiciled in England;

(b) *in the case of proceedings for divorce or nullity of marriage, if -*

- (i) *the wife is resident in England and has been ordinarily resident for a period of three years immediately preceding the commencement of proceedings, and*
- (ii) *the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or in the Isle of Man*

(2) *In any proceedings in which the court has jurisdiction by virtue of the foregoing subsections the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings.*

[16] Section 40 of the English MCA is to all extents and purposes the same² as section 19 of the Anguillian Act, save that the word "and" does not link subsection sections 1(a) and 1(b) as it does in the Anguillian Act.

[17] The law in England again changed in 1973 with the introduction of the Matrimonial Causes Act 1973 (the "English MCA 1973"). Section 46 of the English MCA 1973 provided, under the caption *Additional Jurisdiction in proceedings by a wife* that:

(1) Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall have jurisdiction to entertain proceedings by a wife, notwithstanding that the husband is not domiciled in England and Wales, -

(a) in the case of any proceedings under this Act (other than proceedings under section 19 or sections 34 to 36), if -

- (i) the wife has been deserted by her husband, or
- (ii) the husband has been deported from the United Kingdom under any law for the time being in force relating to deportation

and the husband was immediately before the desertion or deportation domiciled in England and Wales

(b) in the case of proceedings for divorce or nullity of marriage, if -

- (i) the wife is resident in England and Wales and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and
- (ii) the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man

² I do not consider that the change in the sections numbers referred to in the proviso to section 40(1)(a) of the English MCA 1965 and the sections numbers referred to in the proviso to section 19(1)(a) of the Anguillian Act is material. Nor do I consider that the additional section 40(1)(b)(ii) of the English MCA 1965 is relevant for present purposes.

- (2) In any proceedings in which the court has jurisdiction by virtue of subsection (1) above the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England and Wales at the time of the proceedings.

- [18] Section 46 of the English MCA 1973 is identical to section 40 of the English MCA 1965, save the addition of the words "and Wales" in the first part of section 46(1). The most significant distinction between section 46 of the English MCA 1973 and section 19 of the Anguillian Act is the insertion of the word "and" at the end of section 19(1)(a) of the Anguillian Act. The word does not appear in the English MCA 1965.
- [19] Section 46 of the English MCA 1973 was repealed by section 17(2) of the English Domicile and Matrimonial Proceedings Act. I do not propose to consider the provisions of that Act since it marked a significant change of policy in England and is not similar to section 19 of the Anguillian Act.
- [20] The Anguillian Act was enacted in 1990 and brought into force on 1 July 1990. Given the similarities between the provisions of section 19 of the Anguillian Act and section 46 of the English MCA 1973 it is perhaps reasonable to assume that the draftsman responsible for the Anguillian Act had regard to the provisions of the English MCA 1973 when drafting the Anguillian Act.
- [21] I have also looked at the laws of a number of other jurisdictions. The matrimonial laws of St. Kitts & Nevis did at one time contain a provision similar to section 19(1)(a) of the Anguillian Act, but have been amended to move to a different regime for establishing jurisdiction for divorce. The laws of St. Kitts & Nevis did not, insofar as I have been able to determine, ever contain a provision similar to section 19(1)(b) of the Anguillian Act. The laws of the British Virgin Islands are also different. I understand that the law in St. Lucia is very similar to section 19(1) of the Anguillian Act save that the word "and" does not link the equivalent of sections 19(1)(a) and (b).
- [22] Thus, it appears that when enacting the Matrimonial Proceedings and Property Act in Anguilla, the legislature considered it appropriate to insert the word "and" at the end of section 19(1)(a) and thereby link it to section 19(1)(b). The decision made in Anguilla has the effect of making section 19 of the Anguillian Act different from the equivalent section in St. Lucia and in the now repealed sections of English law. It is reasonably clear to me that in St. Lucia, and in England under the now repealed law, jurisdiction in the case of proceedings for divorce could be established under subsections (a) or (b) of the relevant legislations. The consequence of the insertion of the word "and" at the end of subsection 19(1)(a) of the Anguillian Act makes the position less clear.
- [23] The question I have to determine is whether the insertion of the word "and" means that the two sections need to be read together, or whether section 19(1)(b) is a separate and distinct ground. There does not appear to be any good reason why in Anguilla section 19(1)(b) should not be a separate and distinct ground upon which a wife should be able to rely in order to seek a divorce in cases where her husband is not and/or has never been domiciled in the jurisdiction. In my judgment, there would have been no good reason for the Legislature to intend that a wife who falls within 19(1)(b) to also establish the grounds set out in 19(1)(a). Indeed, section 19(1)(a) is expressed to apply to "... any proceedings under this Act (other than proceedings under section 15 or sections 37 to

42)...". Section 19(1)(a) therefore applies, on its face to divorces, unless the word "and" is read to impose an additional requirement to establish the ground set out in section 19(1)(b) if she desires to obtain a divorce. I do not think that this was the intention of the Legislature when the word "and" was inserted into section 19(1)(a). It is not clear to me why the word was added by the draftsman, but I am satisfied that the addition of such word was not intended to conjoin the grounds.

[24] It is my judgment that the intention of the Legislature was to introduce grounds for divorce in Anguilla similar to those that existed in England pursuant to the English MCA 1973. In the circumstances, it is my judgment that the word "and" must be read disjunctively and not conjunctively. Alternatively, and to the extent that I am wrong in my view that the word "and" must be read conjunctively, I am satisfied that I have the ability to apply a rectifying construction to the word so as to achieve the intention of the Legislature to create two distinct and unconnected grounds which a wife may establish so as to found the jurisdiction of the Court to grant a divorce - see Binnion on Statutory Interpretation 5th Ed section 287 at pages 875 to 889.

[25] I am satisfied that the Petitioner in this matter is resident in Anguilla, and that she has ordinarily been resident here for a period of 3 years prior to the presentation of this petition on 8 February 2011. I am satisfied that the marriage has irretrievably broken down, and that all the matters necessary for me to make an Order Nisi have been established. I will make an Order Nisi in the usual form.



Michael J. Fay

High Court Judge (Ag).