

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT MATRIMONIAL CLAIM NO. 93 OF 2000

BETWEEN:

JAMES GRAHAM

Petitioner

v

SHEILA GRAHAM

Respondent

Appearances:

Mr. P.R. Campbell Q.C. and Mrs. Ada Johnson for the Petitioner

Mrs. K. Bacchus-Browne for the Respondent

2009: April 7th
May 5th

JUDGEMENT

BACKGROUND

- [1] **Joseph, Monica J:** This is an application by the petitioner filed on 25th March 2009 to strike out for lack of jurisdiction, the respondent's Notice of ancillary proceedings filed on 31st January 2008.
- [2] The parties were born in Canada and were married on 30th September 1990 in Canada. In 1990s the parties came to St. Vincent and the Grenadines with their children and resided on Mustique Island. On 25th February 2000 the petitioner filed a petition seeking a dissolution of the marriage and a decree absolute was made on 7th August 2000.
- [3] When the decree nisi was granted on 7th July 2000, an order was made declaring that the arrangements for the children of the marriage are satisfactory. Also made was a consent

order incorporating an agreement between the parties dated 6th July 2000. The parties ceased residing in St. Vincent and the Grenadines about the year 2003.

- [4] This striking out application relates to the respondent's notice of ancillary relief seeking orders: (1) that the respondent (should be petitioner) do make to the petitioner (should be respondent) such periodical payments, secured provision and lump sum of money as may seem just. (2) a property adjustment order (3) an injunction restraining the respondent (should be petitioner) from taking the children out of boarding school (4) costs.

AGREEMENT

- [5] Mr. Campbell for the petitioner/applicant, submitted that the agreement that received the sanction of the Court on 7th July 2000 amounts to a maintenance agreement falling within section 45 (1) of the Matrimonial Causes Act (Cap 176) (the Act) in that the agreement recites in paragraph (d): "The parties herein are desirous of settling their financial and property matters and the question of the custody and maintenance for the minor children and all issues arising out of their marriage out of court in manner set out below."
- [6] His submission was that paragraphs (1) to (8) of the agreement deal with financial and property matters pertaining to the petitioner and the respondent: paragraph (11) deals with residence arrangements for the petitioner and the respondent and the children: Paragraph (13) covers the respondent's medical expenses. All those ancillary matters were dealt with in that consent order made by the Court and are again being raised in the respondent's notice of application. It seemed that the Court is now being invited to vary the consent order earlier made.
- [7] Ms. Bacchus-Browne for the respondent indicated that her instructions did not disclose that some of the relief now being sought is part of a Consent Order of the Court. What she might need to consider, she submitted, is whether the petitioner is in contempt of Court for not obeying the order of the court.

ISSUE

- [8] Whether or not the Court has jurisdiction to entertain the respondent wife's Notice of ancillary proceedings.

SECTIONS OF THE ACT

- [9] Before I deal with that main issue I consider submissions made by counsel on the meaning of the expressions "maintenance agreement", "financial provisions", "financial arrangements" and certain sections of the Act that both counsel have referred to.
- [10] Mr. Campbell's submission was that section 45 (1) sets the "bar" to be satisfied: that the consent order is a comprehensive settlement of financial and other matters between the parties and falls squarely within the definition of a maintenance agreement in section 44.
- [11] Mrs. Bacchus-Browne's submission was that maintenance arrangements and maintenance agreements should not be confused with court orders: that financial agreements (out of Court) are frequently made that do not have the force of law and that there is a distinction between maintenance agreements and financial provision orders.
- [12] Section 2 (2) of the Act reads:
"In this Act-
- (a) references to financial provision orders, periodical payments and periodical payments orders and orders for the payment of a lump sum, and references to property adjustment orders, shall be construed in accordance with section 29; and
 - (b) references to orders for maintenance pending suit and to interim orders for maintenance shall be construed respectively in accordance with section 30 and section 36 (6)."
- [13] Paragraph (b) governs interim orders and paragraph (a) governs orders made in divorce proceedings, that are not interim orders, and are periodical payments, secured periodical payments and lump sum payments. Thus this matter falls under paragraph (a), which enacts that section 29 provides the meaning of certain expressions appearing in the Act. That section enacts:

- (1) The financial provision orders for the purposes of this Act are orders for periodical or lump sum provision available (subject to the provisions of this Act) under section 31 for the purpose of adjusting the financial position of the parties to a marriage and any children of the family in connection with proceedings for divorce.....and under section 36(7) on proof of neglect by one party to a marriage to provide, or to make a proper contribution towards, reasonable maintenance for the other or a child of the family that is to say –

(a) any order for periodical payments

(b) any order for secured periodical payments

(c) any order for lump sum provision

and references in this Act to periodical payments orders, secured periodical payments orders, and orders for the payment of a lump sum are references to all or some of the financial provision orders requiring the sort of financial provision in question according as the context of each reference may require.

- “(2) The property adjustment orders for the purposes of this Act are the orders dealing with the property rights available (subject to the provisions of this Act) under section 32 for the purpose of adjusting the financial position of the parties to a marriage on the grant of a decree of divorce –

(a) any order (made under section 32 (1) (a)) for transfer of property;

(b) any order (made under section 32 (1) (b)) for settlement of property;

(c) any order (made under section 32 (1) (c) or (d)) for variation of settlement.”

[14] Section 29 thus sets out the financial provision orders and the property adjustment orders that may be made on the granting of a decree of divorce as are listed under section 31(1). A financial provision order may direct: payment of amounts periodically, or an order that any amounts payable periodically be secured: or payment of a lump sum. A property adjustment order may direct: transfer of property: settlement of property or variation of a settlement. A qualifying factor for those orders (under paragraphs (1) and (2)), is that the order sought must be for the purpose of adjusting the financial position of the parties to a marriage or the children of the marriage.

[15] "Maintenance agreement" and "Financial arrangements" definitions apply in only three sections: sections 44, 45 and 46 whereas "financial provision orders, periodical payment orders and lump sum payments are references used throughout the Act.

[16] Section 44 (2) provides:

"In this section and sections 45 and 46 –
"maintenance agreement" means any agreement in writing made, whether before or after the commencement of this Act, between the parties to a marriage, being –

- (a) an agreement containing financial arrangements, whether made during the continuance or after the dissolution or annulment of the marriage; or
- (b) a separation agreement.

"Financial arrangements" means provisions governing the rights and liabilities towards one another when living separately of the parties to the marriage (including a marriage which has been dissolved.....) in respect of the making or securing of payments or the disposition or use of any property..."

[17] Section 44 (for the purposes of sections 44, 45 and 46), brought all the financial relief provisions of section 29 under its umbrella, by providing a definition of maintenance agreement. That definition recognizes two categories of agreements, one category that contains financial arrangements (as defined) the other category is a separation agreement, with no qualifying element of containing financial arrangements.

[18] I do not think that any distinction relates to financial agreements that may or may not have the force of law. Rather the distinction relates to the content of the agreement. If it is a mere separation agreement it falls within the definition of maintenance agreement. Or it may be an agreement that governs the rights and liabilities of the parties who are living separately. Then it would also satisfy the definition of financial arrangements and would therefore fall within the definition of maintenance agreement.

JURISDICTION

[19] Mr. Campbell submitted that the Court has no jurisdiction to entertain the application made on behalf of the respondent as the parties are not domiciled or resident in St. Vincent and

the Grenadines. He gave these grounds in support of the striking out application: a) the respondent's notice of ancillary proceedings amounts to an attempt at alteration of the Consent agreement of 6th July 2000 and therefore falls under section 45 of the Matrimonial Causes Act Cap (176) b) a section 45 order can only be made if 'each of the parties to the agreement is for the time being either domiciled or resident in St. Vincent and the Grenadines.

[20] Relative to ground (a) his submission was that there was an agreement which may be seen from paragraph (d) of a document (earlier referred to) which was made an order of the court:

[21] Relative to ground (b), Mr. Campbell submitted for the court to have jurisdiction to hear the matter, both parties must satisfy the condition of domicile or residence in St. Vincent and the Grenadines. It is a fundamental rule, he submitted, that parties cannot consent to jurisdiction of a court where statutory provision confers jurisdiction. In support of that submission Mr. Campbell cited **Essex County Council v Essex Incorporated Congregational Church Union** (1963) A.C. 808, and Dicey and Morris Conflict of Laws (1973) Ch. 8 on the concept of domicile.

[22] As I understand Ms. Bacchus-Browne's submission: There is a subsisting agreement sanctioned by the Court. The Court has jurisdiction in that the Court must be able to enforce its own order made on 6th July 2000, particularly so where the petitioner did not obey the court's order and may be in contempt of court. I do not think I can pay heed to the observation relative to contempt of court as that issue is not before the court.

[23] I address the point as to whether the Court has jurisdiction to hear the respondent's application for ancillary relief filed on 31st January 2008..

[24] Three sections 3, 36 and 45 confer jurisdiction to hear certain applications. A common qualifying feature of the three sections is that of domicile or residence of the parties in Saint Vincent and the Grenadines..

[25] Section 45 of the Act provides:

- (1) Where a maintenance agreement is for the time being subsisting and each of the parties to the agreement is for the time being either domiciled or resident in Saint Vincent and the Grenadines, then subject to subsection (3), either party may apply to the Court....for an order under this section.
- (2) If the court to which the application is made is satisfied either -
 - (a) that by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made or, as the case may be, financial arrangements were omitted from it (including a change foreseen by the parties when making the agreement), the agreement should be altered so as to make different, or, as the case may be, so as to contain, financial arrangements, or
 - (b) that the agreement does not contain proper financial arrangements with respect to any child of the family, then.....the court may by order, make such alterations in the agreement –
 then subject to subsections (3), (4) and (5) the Court may, by order, make alterations in the agreement -
 - (i) by varying or revoking any financial arrangements contained in it, or
 - (ii) by inserting in it financial arrangements for the benefit of one of the parties to the agreement ...”

[26] To approach the Court for relief, the elements of that section are to be satisfied are (1) there must be a maintenance agreement which is defined as an agreement containing financial arrangements (2) the agreement must be a subsisting one (3) both parties must be domiciled or resident in St. Vincent and the Grenadines.

[27] Two elements are satisfied: There is an agreement containing financial arrangements which was part of a consent order, and there is a current agreement. With respect to the third element of domicile, the petitioner's notice of application for striking out the respondent's notice of application is supported by the affidavit of Senior Associate Ada Johnson, deposing: the petitioner has instructed her that the parties are not now domiciled or resident in St. Vincent and the Grenadines: The parties do not own nor do they have any interest in real property in St. Vincent and the Grenadines: the children of the family are not domiciled or resident nor do they attend any educational institution in St.

Vincent and the Grenadines. The parties and the children left St. Vincent and the Grenadines about 2003 with no intention of returning to live in St. Vincent and the Grenadines.

[28] To decide on whether the parties are domiciled in Saint Vincent and the Grenadines, I decide on whether St. Vincent and the Grenadines is their permanent home. From the affidavit evidence presented their permanent home is not in St. Vincent and the Grenadines and they are not resident in St. Vincent and the Grenadines.

[29] As the parties do not satisfy the domicile or residence qualification, the Court does not have jurisdiction to entertain the notice of application for ancillary relief filed on 31st January 2008.

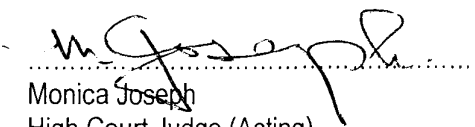
[30] Further, the parties cannot consent to clothe the court with jurisdiction. In *Essex v Essex* p 820 (above) Lord Reid said:

"...I need not consider whether this amounted to a consent to widening the reference to the tribunal, because, in my judgment, it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction"

[31] The application filed on 25th March 2009 on behalf of the petitioner to strike out the respondent's Notice of ancillary proceedings filed on 31st January 2008 for lack of jurisdiction, succeeds.

ORDER

- [32] (1) The respondent's notice of application for ancillary relief filed on 31st January 2008, is struck out.
- (2) Counsel to appear in Chambers on or before 24th June 2009 to address the Court on costs.


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Monica Joseph
High Court Judge (Acting)
29th April 2009