ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.2 OF 1995

BETWEEN:

SHEILA VANESSA HARRIGAN
[Pursuant to an Order of Court
pronounced by Mr. Justice Neville Smith
on the 17th day of February 1995] in
the interest of the Estate of
CONNELL LORENZO HARRIGAN, [Deceased]

Appellant

and

DOLYKIN ROTHENE HARRIGAN

Respondent

Before:

The Rt. Hon. Sir Vincent Floissac	Chief Justice
The Hon. Mr. C. M. Dennis Byron	Justice of Appeal
The Hon. Mr. Satrohan Singh	Justice of Appeal

Appearances:

Mr. L. Moore Q.C. with Mr. T. Astaphan for the Appellant
Mr. Christopher Laing for the Respondent

1996: May 14;
June 10.

JUDGMENT

BYRON, J.A.

The Background

On 9th July, 1993 the respondent had obtained a decree nisi of Divorce against Connell Lorenzo Harrigan, now deceased. It is conceded that no decree absolute of dissolution of this marriage was granted prior to his death.

On 15th July, 1994, Matthew J. heard an application for ancillary relief brought by the respondent under the Matrimonial Proceedings and Property Ordinance 1990. The main relief sought in these proceedings was a property settlement under section 26 of the Act. The property involved was valued at over US$4,000,000.000.

At the commencement of the hearing, counsel for the appellant applied for an adjournment on the ground that the respondent's severe illness in a hospital in Puerto Rico prevented him from attending court or even giving instructions in the matter as a result of which the court would not have either his oral or affidavit evidence, and counsel could not cross-examine the respondent or rebut her testimony. The application was refused and the hearing took place without the participation of the respondent, who died on the 19th July, 1994. On 29th July, 1994 the judge gave a written ruling in the matter in which he made orders relating to the custody of children and to the settlement of property.

The Appeal

The appeal is to set aside these orders. Three main matters were argued. Firstly, that there was a denial of justice in refusing the application for an adjournment; secondly, that the formal order was irregularly filed and thirdly, no orders should have been made under section 26 of the Matrimonial Proceedings and Property Ordinance 1 970 after the death of Connell Lorenzo Harrigan, as there was no decree absolute of divorce.

The Adjournment

Learned counsel for the appellant submitted that the learned trial judge erred in refusing to grant the application.

A judge has a discretion to adjourn or refuse to adjourn a trial. Although the court has an undoubted interest in reducing the delay caused by unnecessary adjournments, this discretion is judicial and should take into account the rules of natural justice, particularly the *audi alteram partem* rule. The authorities, however, indicate that Courts of Appeal tend to be slow to interfere with the exercise of a Judge's

discretion on adjournments.

The facts of this case, however, raise the question, what is the duty of a judge when faced with an application for an adjournment on the ground that a party, whose evidence is directly and seriously material is prevent by illness from attending court, or, where the nature of the proceedings permit, tendering evidence by affidavit?

I adopt the answer given by Scott L.J. in **Dick v Piller [1 943]** 1 A.E.R. 626 at p.629:

> "If he is satisfied [I] of the medical fact and [ii] that the evidence is relevant and may be important, it is his duty to give an adjournment - it may be on terms - but he ought to give it unless, on the other hand, lie is satisfied that an injustice would thereby be done to the other side which cannot be remedied by costs. These questions may depend on matters of degree and matters of fact may be involved...."

The death of the appellant just four days after the application tragically established the medical fact of his serious illness. The learned trial judge had reasoned that the imminent death of the appellant would have had an adverse effect on the respondent's chances of gaining relief in these proceedings. In his concern to avoid the probability of injustice to the respondent by delay lie overlooked the fact that the decree absolute of divorce had not yet been granted. This brought into play the statutory prohibition against the efficacy of any order he might have made for settlement of the property, as I will explain. In my view, no injustice would have been done to the respondent by an adjournment, at least until the decree of divorce had been made absolute.

The Order

Learned Counsel for the appellant submitted that the formal order should be struck out for its irregularity. The accepted facts were that the respondent back-dated the order formalising the ruling of the learned trial Judge to 1 5th July, 1 994 without having obtained any order from the court to do so. The Rules of the Supreme Court 1 970 make provision for the adjustment of the date on which an order of the court should take effect as follows: Order 42 rule 3:

> "[1] A judgment or order of the Court or of the Registrar takes effect from the day of its date.
>
> [2] Such a judgment or order shall be dated as of the day on which it is pronounced, given or made, unless the Court or

> the Registrar, as the case may be, orders it to be dated as of some other earlier or later day, in which case it shall be dated as of that other day."

Under this provision the court may order that, if a party to proceedings before it died after hearing and before judgment, the judgment be dated at the date of the hearing. This was decided in the leading case of **Turner v London and South-Western Railway Company** [1874] L.R. 1 7 Eq.561, followed in **Ecroyd v Coulthard [1** 897] 2 Ch. 554 and applied to a case where the death of the party occurred after judgment and before the hearing of the appeal in **Bonsor v Musicians' Union** [1954] 1 All E.R. 822.

In this case, however, the court made no such order and the rules of court do not confer any such power on a party to proceedings. In the circumstances the judgment takes effect from the date of its delivery on the 29th July, 1 994 and the order as filed was irregular.

The Effect of the Appellant's Death

Learned counsel for the appellant submitted that the judgment was fundamentally flawed because it was wrong for the learned trial judge to make the orders he did after the death of the appellant.

There is no general rule that no further proceedings can be taken under divorce proceedings once one of the parties to it has died. The effect of death on the conduct of such proceedings was examined in the House of Lords in the case of **Barder v Barder** [1987] 2 All E.R. 440.

After considering a selection of the authorities on the subject some of which ruled that death robbed the court of jurisdiction and some that it did not, Lord Brandon delivering the judgment of the House said at p.449:

> "I would state the conclusions to which I think that these authorities lead in this way. Firstly, there is no general rule that, where one of the parties to a divorce suit has died, the suit abates, so that no further proceedings can be taken in it. ..... Secondly, it is unhelpful, in cases of the kind under discussion, to refer to abatement at all. The real question in such cases is whether, where one of the parties to a divorce suit has died, further proceedings in the suit can or cannot be taken. Thirdly, the answer to that question when it arises, depends in all cases on two matters and in some cases also on a third. The third matter is the applicability of s.1[1] of the 1934 Act."

In dealing with the nature of the proceedings in this case, one can start

from the first relevant principle that death terminates the relationship of husband and wife and consequently proceedings which depend on the existence of that relationship. This was the rationale of the Trinidad and Tobago case of **Hinkson v Hinkson** [1971] 18 WIR. 366 where a widow commenced proceedings under the Married Women's Property Ordinance against the estate of her deceased husband for the determination of a claim to property in a summary way. The Court of Appeal decided that it had no jurisdiction to entertain an application under that legislation after the death of a party to the marriage as death had ended the relationship of husband and wife.

A second principle follows logically. No one can obtain a decree absolute for the dissolution of a marriage after it has been already terminated by the death of a party to it. The leading case is **Stanhope** v **Stanhope** [1886] 9 P.D. 103 where a husband who had obtained a decree nisi for the dissolution of his marriage died before the time for making it absolute had arrived. The court decided that the legal Personal Representatives of the husband could not revive the suit for the purpose of applying to make a decree absolute because it was impossible to put an end to that which had already ended. Bowen L.J. said at p.108:

> "A man can no more be divorced after his death than he can after his death be married or sentenced to death. Marriage is a union of husband and wife for their joint lives unless it be dissolved sooner, and the Court cannot dissolve a union which has already been determined."

Thirdly, the importance of that proposition is that where the parties have not been divorced, proceedings in which the completion of the divorce proceedings is a condition precedent to the granting of relief must of necessity fail. Thus a spouse whose marriage had not been determined by divorce could not be granted relief against the estate of her former husband under the Matrimonial Proceedings and Property legislation, as being divorced is a condition precedent for obtaining relief under that legislation. This was the result of the Trinidad and Tobago case of **Bank of Nova Scotia Trust Co. of the West Indies Ltd v Maillard** [1985] 38 W.I.R. 272 in which the respondent had been separated from her husband and had accepted a lump sum for maintenance. After his death she took proceedings under the Matrimonial Proceedings and Property Act 1971 asking for reasonable provision for herself

out of her late husband's estate. The Court of Appeal decided that there was no jurisdiction tinder the Act to make an order in favour of a spouse whose marriage had not been dissolved or annulled.

The relevant statutory provision constitutes a fundamental problem in this case because at the date of the appellant's death no decree absolute had been granted, and the relief sought by the respondent for property orders under section 26 of the **Matrimonial Proceedings and Property Ordinance of 1 970** suffers from a statutory prohibition prescribed by section 34[1][b] which provides:

> "Where a petition for divorce, nullity of marriage or judicial separation has been presented then, subject to subsection [2], proceedings under section 23, 24, 25 or 26 may be begun subject to and in accordance with the rules of court, at any time after the presentation of the petition save that -
> [b] without prejudice to the power to give a direction under section 35, no such order, made or of nullity of marriage, and no settlement made in pursuance of such an order, shall take effect unless the decree has been made absolute."

The property orders sought by the respondent, and made by the learned trial judge, under section 26 of the Act were therefore affected to the extent that they cannot take effect since the decree nisi of dissolution of the marriage has not been made absolute. The legal effect of the appellant's death is that it is no longer possible for the decree to be made absolute and the order of the Judge can never have any effect. The order is therefore futile, it can afford no benefit to the respondent, and should not be allowed to stand.

Order

I, therefore, set aside the order of the learned trial Judge. This is a family matter. The respondent has lost any benefit which the Matrimonial Proceedings and Property Legislation may have conferred on her, consequent upon the untimely death of her late husband. It was pointed out that the respondent was a joint tenant in some of the property in dispute, and she is a beneficiary under the Will of the deceased, the executrix being her own daughter. In the circumstances I would order each party to bear their own costs.

C.M. DENNIS BYRON
Justice of Appeal

I Concur.

SIR VINCENT FLOISSAC
Chief Justice

I Concur.

SATROHAN SINGH
Justice of Appeal