SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1997

Suit No. D43 of 1996

BETWEEN:

MARIA TOHME

Petitioner

AND

MICHEL TOHME

Respondent

Appearances:

Mr. Anthony McNamara for Petitioner/Applicant
Mr. Kenneth Foster Q.C. for Respondent

1997: December 18 and 30

J U D G M E N T

FARARA J. (In Chambers).

On 17th April 1996, the Petitioner filed two applications in the High Court of Justice. The first, her Petition for divorce, and the second, ex-parte upon affidavit for interlocutory injunctive relief.

In her affidavit the Petitioner related extreme acts of verbal and physical abuse, threats of physical violence and physical assault with and without dangerous weapons including a knife and firearm. I do not propose to rehash the specific allegations but

on 14th May 1996 d'Auvergne J., after and inter partes hearing at which both parties were represented by Counsel, granted an injuntion restraining the respondent by himself, his servants or agents from -

(a) abusing, threating, assaulting, molesting or in any other way interferring with the Petitioner.

(b) entering the matrimonial home situate at Cap Estate in the Quarter of Gros Islet for any reason whatsoever.

The said Michel Tohme is allowed to enter into the drive way only of the said premises and only for a limited duration for the purpose of collecting and returning the children of the family to the said matrimonial home at such times as are arranged and agreed with the Petitioner.

The said order of injunction was made perpetual or until further order of the Court.

On 12th July, 1996 the unopposed Petition for divorce was granted and a decree nisi pronounced in favour of the Petitioner on the ground of irretrievable break down of the marriage.

On 20th June 1997 the Petitioner gave notice of application for ancillary relief seeking orders relating, broadly speaking, to custody of the four children of the marriage with access to the Respondent; EC$7,000 per month maintenance and support of the children of the marriage, and payment of all educational and medical bills relation to the said children in accordance with an Agreement dated 21st July

1995 executed by the parties; and a property settlement in relation to the matrimonial home pursuant clauses 1, 2, 3, 4, 6 and 8 of the said Agreement; and legal costs. I will return to the said Agreement in detail later in this judgment.

The application for ancillary relief is supported by the affidavit of the Petitioner filed 20th June 1997 with no exhibits.

On 25th July 1997 the Respondent filed a counter affidavit with no exhibits and on 27th November 1997 a second affidavit of the Petitioner was filed, again with no exhibits.

The seemingly widespread practice by solicitors in St. Lucia of filing affidavits in support of or in opposition to an application for ancillary relief, usually involving issues of maintenance and property settlement without any or very few supporting documentation or exhibits is to be deplored. It is the duty of solicitors in applications of this nature, to ensure that the fullest picture regarding each party's financial position as it relates to or affects those issues is disclosed in the affidavits and well supported by pertinent documentation, so as to minimize the necessity for deponents being extensively examined in chief but instead for the hearing to proceed mainly on the cross-examination of deponents and Counsels submissions. This will go a long way to facilitating the expeditious and timely adjudication of the issues and may also facilitate settlement being reached on all or most of those issues by the parties, with the advise and assistance of their respective Counsel or Solicitor.

In my short stint on the High Court bench in this jurisdiction I have commented and

had occasion to frown on the current practice and I trust that solicitors will take heed. It is not desirable or proper for a litaney of documentation to be supplied to the Court at the eleventh hour or during the conduct of the hearing. They ought to be exhibited to the various affidavits filed by each side well in advance of a hearing. In the instant matter, it is regretable that some of the pertinent documents were sought to be made exhibits only at the hearing on 18th December 1997.

Another practice which is not only bad but contrary to the rules of court and one which ought to be stopped, is that of "listing" and filing of exhibits with an affidavit, when there has been no reference to those exhibits in the said affidavit either by description or by number.

SETTLEMENT AGREEMENT

The Petitioner/Applicant relied principally on a Settlement Agreement executed by the parties on 21st July 1995 (Exhibit MT3) before their respective solicitors and notaries royal, and registered at the Office of Deeds and Mortgages on 26th July 1995 in Vol. 148A No. 172535.

The central question for my determination, particularly as it relates to the issues of maintenance and property settlement, is whether the Agreement ought to be enforced and given effect to by the Court as the Petitioner contends, or whether its terms ought to be altered, as the Respondent contends.

COURT'S POWER TO ALTER AGREEMENT

Section 35(1) of the Divorce Act 1973 stipulates that any provision in a maintenance agreement which purports to restrict a party's right to apply to the Court for an order

containing financial arrangements is void. There is no such provision in this Agreement.

Section 35(2) defines the terms "maintenance agreement" and "financial arrangements" for the purpose of Sections 35 and 36, as:-

> *"maintenance agreement" means any agreement in writing made, whether before or after the commencement of this Act, between the parties to a marriage, being an agreement containing financial arrangements, whether made during the continuance or after the dissolution or annulment of the marriage."*

> *"Financial arrangements" means provisions governing the rights and liabilities towards one another, when living separately, of the parties to a marriage (including a marriage which has been dissolved or annulled) in respect of the making or securing of payments or the dispositions or use of any property, including such rights and liabilities with respect to the maintenance or education of any child whether or not a child of the family."*

It will be seen therefore that a maintenance agreement is an agreement in writing containing financial arrangements, that is to say, provisions governing the rights and liabilities of the parties to a marriage when living separately relating to payments, dispositions and use of property and the maintenance or education of children whether or not of the family.

The Agreement executed by the parties on 21st July 1995 (MT3) after legal advise and in the presence of their respective solicitor/notary royal is, in my judgment, a maintenance agreement for the purposes of Sections 35 and 36 of the Divorce Act 1973. Even though it was executed at a time when the parties were living together, certain of its provisions relate to when they are living separately, as is clear from a reading of Recital (3) and Clause 3 of the Agreement.

Of course, if it is not a maintance agreement as defined, then the provisions of Section 36 enabling a party to apply to the Court and empowering the Court to vary or revoke any financial arrangements contained therein or to insert therein financial arrangements for the benefit of one of the parties or a child of the family would not be applicable thereto.

On the basis that the Agreement is a maintenance agreement, has either party applied to the Court for an order under Section 36 of the Divorce Act 1973, for it is only upon such application that the Court can exercise its power to make an order under that Section. The Court cannot of its own motion make any such order.

Section 36 provides for certain prerequisites before a party to a maintanance agreement can apply for the orders contemplated by that section.

The agreement must be subsisting. It is clear that the Agreement of 21st July 1995 has not been terminated, revoked, cancelled nor has it lapsed and is therefore subsisting and in effect as an agreement between the parties relating to the matters addressed therein.

The parties to the agreement must be either domiciled or resident in Saint Lucia. It is clear from the affidavit and oral testimony that both parties are domiciled and resident in Saint Lucia.

The Petitioner in her application for ancillary relief relies singularly on the terms of the Agreement in so far as it relates to matters of maintance and property rights , and in no way does she seek to vary or revoke any of its financial arrangements or to have a new financial arrangement inserted therein. The Petitioner has therefore not made any application under or pursuant to Section 36 of the Divorce Act for any order permitted thereby.

The Respondent has filed no application in this action whatsoever, and no application under Section 36 of the Divorce Act made or brought by him has been put to this Court. Further, in his counter affidavit (the only document he filed in this action or in relation to this application) he makes absolutely no reference to the Agreement of 21st July 1995 or any of its terms. At paragraph 4 of this affidavit he merely makes, as regards the property a "counter proposal" to the relief sought at paragraph 4 of the Petitioner's Notice of Application for Ancillary Relief. Can this be construed as an application for variation? In my view strictly speaking it is not such an application either in form or substance and therefore there is no application before the Court pursuant to Section 36 of the Divorce Act. The Agreement of 21st July 1995 therefore stands as is and is fully enforceable as a valid agreement relating to the matters addressed therein.

However, if on some generous interpretation, paragraph 4 of the Respondents counter

affidavit or any other paragraph thereof can be construed as an application pursuant to Section 36, I will go on to deal with the question of whether there is any basis for the Court varying or revoking any of the financial arrangements in the Agreement or inserting some new financial arrangement.

CHANGE CIRCUMSTANCE

Before making any of the orders contemplated by Section 36 a Court must be 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.

Condition (b) stipulated in Section 36(2) has no application to the instant matter as none of the parties have alleged inadequacy of any financial arrangement provided for in the Agreement.

Has any change in the circumstances of the Respondent been made out from the evidence?

Learned Counsel for the Respondent in his address relying on Rule 50 of the Divorce

Rules, submitted that the Court has power to vary a settlement "order" at anytime and that the Court can vary the terms of the Agreement having regard to the evidence of the parties. He urged that the Court adopt the proposal at paragraph 4 of the Respondent's affidavit, that is, sell the property liquidate the mortgage and distribute the net proceeds of sale equally between the parties. He further submitted, that in view of the Respondent's impecunosity it would be too onerous for him to be required to pay the medical and educational expenses for the children of the family as he is finding it difficult to meet the $3,000 per month. maintanenace ordered by the Court.

On the other hand, Learned Counsel for the Petitioner submitted that there has been no change in the Respondent's circumstances since the making of the Agreement, within the meaning of Section 36(2) of the Divorce Act 1973. In support of this submission he relied on three authorities.

In **Edgar v. Edgar (1980) 3 AER 887** the parties and their solicitors had negotiated an agreement containing a clause whereby the wife agreed that if she obtained a divorce she would not claim a lump sum or property transfer orders. The husband , did not put pressure on the wife to accept the terms of the deal and in no way exploited his position as a wealthy man. The wife having subsequently petitioned for divorce it was held -

> *"The court, when exercising the discretion given to it by Section 23(1) of the 1973 Act to order a lump sum payment, was required to give effect to a prior agreement by the wife not to claim a lump sum by treating that agreement as conduct of the parties which was to be taken into account*

when considering under Section 25(1) of that Act what was just between the parties in the circumstances. In deciding the weight to be given to a prior agreement in order to do justice between the parties, the Court had to take into account, inter alia, the parties conduct leading up to the agreement, their subsequent conduct, and the circumstances surrounding the making of the agreement such as undue pressure by one party on the other, exploitation by one party of a dominant position, the inadequate knowledge of one party, and any unforseen or over looked change in the circumstances existing at the date of the agreement."

Absolutely no evidence or assertion of any pressure or undue influence by the Petitioner or her legal advisors upon the Respondent at the time of negotiations leading to or at the signing of the Agreement (MT3) has been led or made before me by the Respondent or his Counsel.

There is some evidence, and from the Petitioner herself, that the Respondent takes certain medication which at times causes mode swings. There is no evidence that he was affected by such medication at the time of negotiating or executing the said Agreement. Indeed, he was represented by a solicitor both during the negotiations and at the time of execution of the Agreement.

The Respondent in his affidavit and in examination in chief led no evidence as to the negotiations leading up to or the signing of the Agreement. It is under cross-examination that he stated -

"At the time when I signed the agreement I was not in a frame of mind. I was under prescribed drugs."

The Respondent is an experienced business man with a keen sense of matters concerning money and investment as demonstrated by his success in both business and real property investments. He was advised by an experienced lawyer. I therefore do not accept as truthful his testimony quoted above, and I certainly do not accept that at the time he executed the agreement his mental faculties were affected by prescription drugs and no proof, in the form of prescriptions or doctor's certificate or testimony to that effect has been produced to me. I therefore reject any contention that the Agreement in MT1 is anything other than a valid enforceable agreement made by the parties in settlement of their property and financial interests in contemplation of divorce.

The second authority relied on by Mr. McNamara is **Wright v. Wright** (1970) 3 AER 209. That case concerned financial arrangements and the Court held that the wife had failed to offer prima facie proof that there had been unforseen circumstances which made it impossible for her to work or otherwise maintain herself, so as to entitle her to apply to the Court for further maintenance notwithstanding what her counsel had represented to the court at the time the financial arrangements were agreed and presented to the judge. **Sir Gordon Willmer at page 214 a - b opined -**

"I think for my part approaching it de novo and in the absence of authorities, that the proper view is to say that this was an agreement entered into with full knowledge of all the circumstances and with the advise of both parties' legal

advisors. It is therefore, something to which considerable attention must be paid."

This case turns largely on the expression "unforseen circumstances" used by the wife's counsel to the judge at the time of the financial arrangement being reached and is therefore of limited assistance in construing Section 36(2) of the Divorce Act 1973 and, hence, of limited application to the instant matter.

And finally, Counsel for the Petitioner cited **Young v. Young** (1961) 3 AER 695 a decision of the English Court of Appeal in which it was held that the agreement was not a post-nuptial settlement within Section 25 of the Matrimonial Courses Act 1950 (UK) and therefore could not be varied by the Court. I do not consider this case to be of any application to or of assistance in deciding this matter.

VALIDITY OF AGREEMENT

Learned Counsel for the Respondent in his relpy challenged the validity of the Agreement on the basis of lack of consideration and it not being under seal. In support of his submission he referred to **Principles of Family Law 13th Edition by S.M. Cretney at pages 227 to 228.** He contended that the Agreement is a voluntary declaration of intent to make a gift which will not surface.

The learned author of **Principles of Family Law** at page 227 opines that a written document may be effective either as a contract for the disposition of an interest in land or as a declaration of trust if certain conditions are satisfied. Three of these conditions viz, an intention to create legal relations which can be presumed where the

parties are not living in amnity, certainty of terms, and the document being signed by the parties, are indisputably satisfied by the Agreement MT3.

As regards the fourth condition, the Agreement is not under seal. However, in my view it is clearly supported by consideration. This is clear from Recitals (1) and (2) and, most importantly, clause 8 which reads -

> *"The transfer as provided herein by the husband to the wife of his half share in the matrimonial home registered as Block 1459B Parcel 16 aforesaid will settle in full all financial claims past, present and future that the wife may have against the husband in respect of property, maintanance, alimony and lump sum payments arising out of any divorce proceedings or otherwise in any and all claims for financial settlement made by the wife against the husband with respect to the marriage."*

I therefore conclude that the Agreement MT3 is a valid and binding maintenance or post nuptial settlement agreement between the Petitioner and the Respondent.

Counsel for the Respondent also submitted that the modern approach of the Courts is to de-emphasize the conduct of the parties and the paramount consideration is the financial position of the family. In support of this proposition Counsel relied on **Principles of Family Law (Supra) at page 286.**

It is well settled that in considering matters of matrimonial property rights and maintenance the financial considerations affecting these issues and not the conduct of the parties is to be emphasized. I do not therefore consider the alleged conduct of

the Respondent as being of any significance in deciding upon the issues of maintenance and property rights.

CHANGE CIRCUMSTANCES

Learned Counsel for the Petitioner/Applicant submitted that there has been no change in the circumstances of the Respondent from execution of the Agreement. He emphasized that the Respondent admitted that all bank loans listed at paragraph 3(i) and most debts to suppliers at paragraph 3(ii) of his affidavit were in existence at the time of execution of the Agreement. The Respondent deposed at paragraph 3(iv) of his affidavit that his chargeable income is $3,000 per year. During his oral testimony he stated and produced his income tax return for the financial year ending 31st December 1996 showing a chargeable income of $6,631. I do not for a moment accept this as credible evidence coming from a person who has several income producing properties and businesses, and who was considered by certain commercial banks in St. Lucia to be sufficiently creditworthy to have lent him recently additional substantial sums by way of re-financing and for property improvements.

Mr. Foster in his reply argued that there has been a change in the Respondent's circumstances in that, in order for the Respondent to survive financially and to prevent the banks from foreclosing on him and his businesses, he has had to re-finance by taking new or up-stamping existing mortgages to secure sums previously loaned to him.

CONCLUSIONS

The Agreement MT3 expressly recognises the Petitioner's contribution to the acquisition of the matrimonial home at Cap Estate. I accept her evidence that she

provided the purchase price for the land and reject the Respondent's contention that said monies were derrived from the sale by him of one of his properties in Canada prior to their coming to St. Lucia, particularly as the land at Cap Estate was purchased several years later and his testimony was that he gave her the money to keep which I do not accept.

The Respondent acquired several other properties during the marriage including the Rain property which he purchased with the assistance of a loan from the Petitioner.

The Agreement settles on the Petitioner the Respondent's half share of the matrimonial home, with the Respondent continuing the pay the mortgage thereon, a mortgage which he has obviously borrowed further against for his businesses to the extent that the principal sum remains at $750,000. If the house is sold and the mortgage paid off, that amount becomes a debt from the Respondent to the Petitioner pursuant to the terms of the Agreement. In other words the Petitioner is to have the Respondent's half share in the matrimonial home free and clear. This is in consideration of the Petitioner abandoning all claims past, present and future to the other properties acquired during the marriage and to maintenance, alimony and lump sum payment.

I can find no good reason or no changed circumstances from the date of execution of the Agreement which would justify the Court varying those terms in anyway or in the manner proposed at paragraph 4 of the Respondent's counter affidavit, which is rejected.

ORDER

I accordingly make the orders sought at paragraph 4(a), (b), (c) and (d) of the Petitioner's Notice filed 20th June 1997.

MAINTENANCE OF CHILDREN

In her Notice the Petitioner seeks a maintenance order in the sum of EC$7,000 (equivalent of Canadian $3,500) per month in accordance with Clause 7 of the Agreement. However, Clause 7 provides for the Respondent to continue to pay the maintenance and support for the children of the family, including the children's education and medical expenses. It then goes on to provide that should the Petitioner decide to move to Canada or elsewhere then the Respondent will pay monthly the sum of CDA$3,500 for maintenance and support of the children, in addition to education and medical expenses up to the age of eighteen (18) years or until the children shall complete a course of further education or training.

In short, the sum of CDA$3,500 does not become effective until the Petitioner decides to or has moved to reside elsewhere than in St. Lucia. While the Petitioner has in her oral testimony stated her desire to move from St. Lucia, she is yet to do so.

In my judgment the Respondent's obligation under Clause 7 to pay the equivalent of CDA$3,500 maintenance for the children in addition to their education and medical expenses has not yet arisen, as the Petitioner has not made any firm plans to nor has she moved to live in Canada or elsewhere. That obligation will arise as and when the Petitioner does in fact move to live outside St. Lucia with the children and I so hold. In the meantime, he is obligated to provide for the children's maintenance and support in St. Lucia, including their education and medical expenses whatever they

may be, and I so order.

CUSTODY OF THE CHILDREN

The agreement does not specifically address the issue of custody. However, Clause 7 obviously contemplates the Petitioner moving to live with the children in Canada or elsewhere as it provides for the maintenance and support, education and medical care of the children in such circumstances. However, this does not mean sole custody of the children would go to the Petitioner.

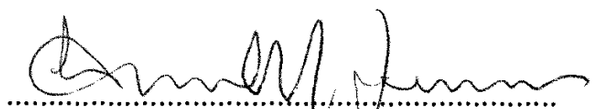
Having regard to all the evidence before me, including that of the relationship between each parent and the children, I am of the view that the proper order in the circumstances for the welfare of the children would be and I order as follows:-

> The Petitioner and Respondent to have joint custody of the four children of the family namely: Tamarah Christina, Talal Saied Christopher, Tanya Athanasia, and Tahmer Constantine with the four children residing with the Petitioner whether in St. Lucia or elsewhere and with reasonable access to the Respondent by the said children visiting with him on weekends or school holidays.

THE INJUNCTION

The application to discharge the injunction was not before me for hearing and it was

filed in the wrong suit anyway. That matter will have to await hearing by another judge.



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GERARD ST. CLAIR FARARA Q.C.
High Court Judge (Acting)