THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHMT2008/0146

Between:

LEILA JONAS

Petitioner

and

ARIF JONAS

Respondent

Appearances:

Mr. Hugh Marshall and Ms. Kema Benjamin of Marshall & Co for the Petitioner
Mrs. T. Benn Roberts for the Respondent

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2017: May 5
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DECISION

[1] HENRY, J.:The parties were married on 9th September, 1999. The marriage produced three children. Unhappily differences arose and divorce proceedings were commenced by Leila Jones (the wife) on 1st October 2008. The parties entered into a Deed of Family Arrangement dated 19th September 2008 by virtue of clause 3, custody and control of the children are held solely by the wife with the right of visitation to the father. The husband asserts that the wife has deliberately, wilfully and consistently breached the arrangement by completely restricting or significantly limiting the rights of the husband to access and visitation with the children. By application he seeks the following orders:

1) The custody, supervision, care and control of the three minor children, namely Blaire Rashad Jonas on March 22, 2002, Camden Mateo Jonas born on

march 28 2004 and Daniel Timothy Jonas born on April 1, 2008 be held JOINTLY between the Applicant and the Respondent.

2) The residence of Blaire Rashad Jonas born on March 22, 2002, Camden Mateo Jonas born on March 28, 2004 and Daniel Timothy Jonas born on April 1, 2008 be jointly shared between the Applicant and the Respondent so that the Applicant can exercise and enjoy his rights to full and unfettered ACCESS to the Children, spend significant and quality time with the Children, have regular and consistent contact with the Children and build a better and stronger relationship between father and Children.
3) That the payments of maintenance to the Respondent be suspended during the periods of time that the Children are residing with the Applicant.
4) Both the Applicant and the Respondent be restricted from making any major decisions relating to the education, health and religion of the Children or any other major decision relating to the upbringing of the Children and/or which is likely to affect the overall interest and welfare of the Children without consulting each other and/or from removing the children from the jurisdiction of Antigua and Barbuda without first obtaining the consent of the other.
5) The Deed of Family Arrangement dated the 19th day of September, 2008 and the Order of the court dated 3rd February, 2012 be varied accordingly.

[2] At the hearing of the application, the wife made the following preliminary submissions: that a Deed of Family Arrangement is akin to a consent order in so far as the terms are expressly agreed upon by the parties. A Deed is a contract which evidences the terms the consenting parties intend to be bound by. Therefore the rules for variation of a contract apply. A contract and therefore a Deed, can only be varied on grounds of mistake, misrepresentation or fraud. Therefore, a court will not interfere with an existing Deed save and except in circumstances with which it could interfere with a contract.

[3] Further, in the case before the court, the husband is asking the court to vary clause 3 of the Deed to grant him and the wife joint custody of the children. The husband does not allege mistake, misrepresentation or fraud. She further submits that the law is well settled that a party who seeks to challenge a Consent Order or a Deed of Family Arrangement, once it has been drawn up and sealed is to appeal the order or bring fresh proceedings to vary and/or set it aside. She refers the court to the cases of de Lasala v de Lasala[1] and Patrick Thomas et al v Thomas Real Estate Company Ltd[2]. The wife points out that the husband has not challenged the Deed by way of a fresh action and there has been no appeal.

[1] [1979] All ER 1155
[2] GDAHCV2001/652

He has chosen instead to make an application to vary the Deed to allow for joint custody of the children in the same matrimonial proceedings.

[4] According to the wife, the main proceedings are no longer extant, having been concluded by an order of the court dated 19th December 2008 dissolving the marriage. The court is now functus in the matrimonial proceedings and this court, as a matter of law, lacks the jurisdiction to entertain the present application and grant the relief sought. As the Deed emanates from family proceedings, this Honourable court has no jurisdiction to either vary and/or set it aside. The application must therefore be dismissed with appropriate costs.

[5] The husband submits that section 15 of the Divorce Act gives the court the power to make an order varying, rescinding or suspending a custody order or support order on the application of either or both "former spouses". A Deed of Family Arrangement is therefore not binding on the court, and the court may review it at any time once the interest of the children dictates such action. This court has jurisdiction to hear the matter and it is not necessary to bring a fresh action. Accordingly, he asks that the wife's submissions be rejected.

[6] The English courts have generally held that a consent order evidences or embodies a genuine contract between parties resolving disputes. Courts will only interfere on the same grounds as it might interfere with any other contract such as fraud, and mistake which justifies such intervention[3]. This has been held to be applicable to orders obtained in ancillary proceedings under the U.K. Matrimonial Causes Act.

[7] In the De Lasala case, the wife applied under section 15 of the Matrimonial Proceedings and Property Ordinance of Hong Kong, for variation or revocation of the Deed of Arrangement as a subsisting maintenance agreement. In her supporting affidavit the wife alleged that her consent to the deed of arrangement had been given under a mistake as to the husband's means induced by his misrepresentations. The court held that it had no jurisdiction to make the orders. The matter was eventually appealed to the Privy Council. The UK House of Lords had in 1979 decided Minton v Minton[4] in which it held that under section 23 (1) of the UK Matrimonial Causes Act 1973 the court had no jurisdiction to make, from time to time, a second or subsequent order for financial provision after an earlier application had been dismissed. The Privy Council found that the Hong Kong enactment was the same as its English equivalent and held the House of Lords interpretation of section 23 (1) to be binding on the Hong Kong courts. Therefore the Supreme Court of Hong Kong had no jurisdiction to make the requested

[3] Purcell v F.C. Trigell [1971] 1 QB 358
[4] [1979] A.C. 593

orders. The Privy Council found specifically that the Hong Kong enactment conferred no jurisdiction on the court and accordingly, the court had no power to set aside or vary the "once-for-all provision" contained in the consent order. Further, that where an arrangement between spouses had become the subject of a consent order the arrangement was no longer a "subsisting maintenance agreement" but a final order of the court and that, therefore, the Supreme Court had no jurisdiction under section 15 of the Ordinance to entertain the wife's application to vary the deed or arrangement. The final order could not be challenged in the instant proceedings and would require a fresh action brought for that purpose.

[8] Divorce and ancillary proceedings in Antigua and Barbuda are, however, governed by the Divorce Act 1997 (the Act). There are three (3) types of proceedings under the Act: (a) divorce proceedings, (b) corollary proceedings and (c) variation proceedings.

[9] In any divorce proceedings under the Act, the court must satisfy itself, inter alia, that reasonable arrangements have been made for the support of any children of the marriage. If no such arrangements have been made the court may stay the divorce proceedings. In the divorce proceedings herein, the wife attached to her petition for divorce the Deed of Family Arrangement evidencing the agreed arrangements between the parties for the support, custody and education of the three children of the marriage. The court accepted the terms thereof as satisfactory and the divorce was thereafter granted. In this respect, the Deed is similar to a Consent Order where the parties have negotiated and agreed the terms of an order.

[10] By section 21 of the Act, the Matrimonial Causes Act, Cap 268 was repealed. Section 15 (1) provides:-

> 15. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively:-
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> > (a) a support order or any provision thereof on application by either or both former spouses; or
> > (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

[11] Section 15 (5) is very instructive. It provides:

> "(5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition means, needs or other circumstances of the child of the

marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be , and, in making the variation order, the court shall take into consideration only the best interest of the child as determined by reference to that change."

[12] The provisions of the Act are not modelled after the UK legislation nor can it be said to be equivalent to the UK Matrimonial Causes Act. It is evident from the statutory scheme of the Act, Parliament intended the court to have continuing jurisdiction after the divorce is made final and after any final order has been made in respect of support and custody of the children. Section 15 specifically makes provision for former spouses to apply to the court for variation of support or custody orders whenever there is a change in the condition means, needs or other circumstances of the child occurring during the subsistence of the order, whether it be a final order, a consent order. The overriding consideration is what is in the best interest of the child.

[13] The cases interpreting the Canadian Divorce Act RSC 1985 upon which our Divorce Act is based supports this approach. In Willick v Willick[5], in addressing the court's jurisdiction to vary support provision in a separation agreement, the court stated: "Courts are not bound by the agreements of the parties as regards child support. Such agreements can rarely accurately foresee the future and the way in which the circumstances of the parties and their children may evolve and change over the years." The same applies to provisions for access in agreements. The Canadian courts have consistently concluded that variation of child support or spousal support orders determined by separation agreement between the parties is within the purview of the courts pursuant to their Divorce Act. While the Canadian cases are not binding on this court, the court finds them persuasive due to the similarity in both pieces of legislation.

[14] Further, the court notes that in October 2011, over two years after the divorce became final, the wife by summons made application in the instant proceedings for the payment of arrears of maintenance due to her under the Deed and for an order that the husband continue to make payments under the Deed. The husband responded by presenting evidence that since the execution of the Deed, he had suffered a reduction of income due to the state of the economy. He requested that the court reduce the monthly sums payable for maintenance under the Deed. By order dated 3rd February 2012, the court varied the terms of the Deed by reducing the monthly payments for maintenance. The court made other orders in respect of educational expenses and also addressed the issue of spousal support. This was the last application made before the instant one.

[5] [1994] 3 SCR 670, 1974 CanLII 28

[15] The court is of the view that the De Lasala case is clearly distinguishable and therefore not binding on this court. Notwithstanding that the divorce was granted in December 2008, the court is not functus. The Act has conferred on the court continuing jurisdiction to entertain an application after a final divorce order is made either under section 14 for an order respecting the custody of or the access to any or all children of the marriage or under section 15 for variation of a previous order respecting custody and access. There are no "once-for-all provisions" in orders under the Act. Further, fresh proceedings need not be brought.

[16] Both sections 14 and 15 refer to an application for the appropriate order. Section 23 of the Divorce Rules 1998 provides that a person who wishes to vary, suspend or rescind a final order for support, custody or access under section 15 of the Act or obtain such an order after a divorce shall do so by application by summons.

[17] The court notes that the application in this matter was by Notice of Application. In this respect, Counsel erred procedurally. The application ought to have been made by summons.

[18] Accordingly, the submissions by the wife are rejected. Leave is granted to the husband to file and serve the appropriate summons on or before 17th May 2017. Consideration of the substantive application is adjourned to 22nd May 2017 at 11am.

Clare Henry
High Court Judge

By the Court

Registrar