BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT

FAMILY DIVISION

No. 645 of 2009

BETWEEN:

SHEILA GRAHAM **Applicant**

AND

JAMES GRAHAM **Respondent**

Before: The Hon. Madam Justice Kaye Goodridge, Judge of the High Court.

2012: April 12, 13 and 20

Mrs. Tammy Bryan of George Walton Payne & Co., Attorneys-at-Law for the Applicant
Mr. Sasha Kissoon of Weekes Kissoon Deane, Attorneys-at-Law for the Respondent

DECISION

Nature of Action

[1] This is an application brought by the Applicant in which she seeks an order that the Respondent pay the sum of BDS$1,000,000.00 for the maintenance of the children of the marriage.

The Facts

[2] The Applicant and the Respondent are citizens of the Dominion of Canada who were married in Ontario, Canada on 30 September 1990. There are two (2) children of the marriage, namely Leslie Ann Wishart Graham, born on 6 November 1991 and John Osbourne Graham, born on 1 June 1993.

[3] In 1998 the parties moved to Mustique in the Grenadines, after residing in England for some time. Matrimonial difficulties arose between the parties and a decree absolute of dissolution of the marriage was pronounced by the High Court of Saint Vincent and the Grenadines (The SVG Court) on 7 July 2000.

[4] The parties had executed an agreement on 6 July 2000 which was incorporated and embodied as an order of the SVG Court. It provided, inter alia, for the settlement of their substantial interests in properties in New York and the Grenadines and for the payment of monies to the Applicant by the Respondent for the construction or purchase of a home at Lake Placid in New York. The order was a consent order.

[5] Of importance to this application is Clause 9 of the said agreement which contains the provisions in respect of the maintenance of the children of the marriage. That clause provides as follows:

> "9. The Petitioner shall pay to the Respondent child support in monthly payments of Three Thousand Canadian Dollars (CDN $3,000.00) commencing 1 August 2000 in respect of maintenance for each minor child (for a total of $6,000.00 per month for both children) until the earliest of the following events:
>
> (a) The child becomes 18 years of age and ceases to be in full time attendance at a educational institution;
>
> (b) The child becomes 25 years of age, provided that the child shall be entitled to take a year off of his education and return to school;
>
> (c) The child completes a first degree, diploma or equivalent of post secondary education;
>
> (d) The child marries;
>
> (e) The child dies.
>
> Provided this sum shall be varied annually and a percentage equal to variations in the Canadian Consumer Price Index. In addition, the Petitioner shall bear the cost of the minor children's necessary medical expenses for so long as he is required to pay support as required above and 5 return charter flights between Barbados and Saint Vincent and the Grenadines in order to implement the schedule set out in Paragraph 11."

[6] Subsequently, the parties executed an Amending Agreement dated 20 March 2002 and a Second Amending Agreement dated 17 June 2003 in which they modified some of the terms of the original agreement. In the latter agreement it was agreed that the Petitioner would pay to the Respondent the sum of CDN $1,600,000 in full and final satisfaction of any and all financial obligations arising from the Separation Agreement with the sum of CDN $500,000 being paid in full settlement of the maintenance for the children of the marriage. No application was made by either party to the SVG Court to have its original order varied.

The Issue

[7] The issue which arises for the determination of this court is whether this court has jurisdiction to hear the maintenance application given that the issue of maintenance has been determined and an order (by consent) made by the SVG Court.

The Submissions

The Applicant's Submissions

[8] It is the Applicant's submission that her residence in Barbados at the time of the filing of the application satisfies the requirements of ***section 20(3)*** of the ***Family Law Act, Cap.214 (the Act).***

[9] Counsel submitted that under the civil jurisdiction of the court, when a matter has been adjudicated, the plea of res judicata applies except in special circumstances. However, family law matters relating to children are treated differently by the courts and the courts have ruled that matters can be litigated even where a court in another jurisdiction had made an order in relation to the subject matter. In support, counsel quoted the cases of ***Brown v. Brown, McCarthy v. McCarthy No. 773 of 1949 (Trinidad & Tobago)*** and ***Mckee v. Mckee (1951) A C 352*** as well as the ***Treatise Private International Family Law*** written by ***Winston Anderson Ph.D (Cantab),*** now ***Justice of Appeal*** of the ***Caribbean Court of Justice.***

[10] In view of the foregoing, this court ought to assume jurisdiction to hear the present application for maintenance because it involves the welfare of the child which is the paramount consideration.

The Respondent's Submissions

[11] Counsel for the Respondent submitted that this court ought not to hear this application as (1) the matter is res judicata and ought not to be opened by this court and (2) that Barbados is not the appropriate jurisdiction in any event to hear the matter by way of the principle forum non conveniens.

[12] Counsel submitted that the Agreement between the parties settled all the issues between them including the maintenance of their children. He referred to clause 17 of the Agreement which provides:

> "17 Save and except for the provision of this Agreement, the Petitioner and the Respondent accept the terms herein in full and final settlement and hereby releases all claims arising out of their marriage, past events and financial dependency in any jurisdiction."

[13] It is his further submission that the Applicant has not invoked the jurisdiction of the SVG Court but is asking this court to entertain an application in respect of a consent order made by the SVG Court on matters which have already been adjudicated.

[14] Counsel contended that the UK Courts are reluctant to consider family matters where the issues in question have already been determined in proceedings outside of the United Kingdom and may decline jurisdiction. He cited the cases ***Spiliada Maritime Corporation v. Cansulex Limited [1987] ECC 168 (the Spiliada case)*** and ***de Dampierre v. de Dampierre [1988] 1 AC 92*** in support of this contention.

[15] Counsel's final submission was that the action is frivolous and vexatious and ought to be dismissed and such order made as to costs as the court thinks fit.

Discussion

[16] The Applicant has framed her application in terms of a maintenance application under ***section 54(3)(b)*** of the ***Act,*** which provides that the court may " (b) make an order for the maintenance of a child who has attained the age of 18 years, being an order that is expressed to continue in force until a day, or for a period, specified in the order, if the court is satisfied that the provision of the maintenance is necessary to enable the child to complete his education …"

[17] The interpretation to be placed on the application must be construed in the light of the facts outlined above which demonstrate that there was or is a previous order of a court of foreign jurisdiction, namely the SVG Court for maintenance of the children. Having regard to Clause 9 of the Agreement, it is clear that the Applicant already has the equivalent of the order she is now seeking in the SVG Court.

[18] It seems to me therefore, that the present application, while ostensibly a first application before this court, is not a new one, but rather is an attempt to vary the order of the SVG Court, so as to provide for a lump sum payment, instead of the periodic payments ordered under Clause 9. To hold otherwise would mean that the Applicant could have the benefit of two orders running concurrently, if this Court was to accede to her application, namely an order for periodic maintenance under the SVG order and a lump sum payment under the present application. This would not, in the opinion of the court, meet the justice of the case.

[19] I turn next to the submission that the order of the SVG Court is a final order. Though the Agreement speaks in Clause 17 of final settlement, there is nothing in the Agreement which bars either party from applying to the SVG Court for a variation of the order of that court. Reference is made to my previous observation that neither party applied to the SVG Court to vary its order so as to embody these subsequent modifications of the Agreement in a varied court order. This they ought to have done.

[20] It is trite law that courts have the jurisdiction to vary their own orders, including consent orders in appropriate cases, some of which include fraud, duress, the suppression of evidence or where the circumstances of the parties so warrant. In this case, it is for the applicant to move the SVG Court to vary its order.

[21] It is the practice in many jurisdictions, including Barbados, that orders usually provide for periodic payments in respect of the maintenance of children. This approach enables a court at a subsequent date to entertain applications for variation based on the child's changing needs or changes in the financial circumstances of the parties – see the case of ***In the Marriage of Ryan [1995] F.L.C 92-594*** at ***81,894.*** The provision of lump sum payments which discharge maintenance obligations is not the norm.

[22] Mr. Kissoon canvassed the issue of forum non conveniens and relied on the **Spiliada** case, but it seems to me that the issue is not only as to the appropriate forum but also one of jurisdiction, as this application is essentially one for variation of an earlier order. I therefore hold that this court has no jurisdiction to entertain the application and that it should be dismissed.

[23] There is a final observation and it is this. Even though this is not an application for custody, it is noted that Clause 16 of the Agreement provides that any question or difference arising between the parties pertaining to the custody of the minor children "shall only be determined by the High Court of Saint Vincent and the Grenadines and by no other court".

[24] It is not unreasonable to assume therefore that, having determined the forum conveniens for the adjudication of any dispute relating to custody, although not specifically stated in the agreement, any maintenance issues which arise would be better determined in the court of SVG, that being the forum in which the parties resided; which dissolved their marriage and which by its order settled their property and maintenance obligations.

[25] With reference to the submission that the application is frivolous and vexatious, I am of the opinion that the application is more misconceived than frivolous and vexatious, based upon the Applicant's interpretation of the ***Act.*** This is not a case in which I consider that I should exercise my discretion to order costs against the Applicant.

Disposal

[26] It is ordered that the application filed on 11 December 2009 is dismissed. Each party shall bear their costs of the application.

Kaye Goodridge
Judge of the High Court