

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

FAMILY DIVISION

No. 399 of 2013

BETWEEN:

MARTYN GEORGE NORSWORTHY APPLICANT/HUSBAND

AND

LOUISE EMMA NORSWORTHY RESPONDENT/WIFE

Before Dr. The Hon. Madam Justice Sonia Richards, Judge of the High Court.

2014: April 14, November 28

Mr. Milton O. Pierce Q.C., Attorney-at-Law for the Applicant/Husband.

Ms. Paula S. Jemmott, Attorney-at-Law for the Respondent/Wife.

DECISION

Introduction

- [1] The Applicant/Husband filed proceedings for dissolution of marriage on 04 September 2013. The Respondent/Wife opposes the application on the basis that, at the time of filing, the Husband was not domiciled in Barbados. She

also alleges that the parties were not separated for the period of time mandated by the Family Law Act, Cap. 214 (“the Act”).

Background

- [2] The parties were married in England on 05 October, 2002. They lived in England until August 2004, when they relocated to Barbados. There are two children of the marriage. The first child was born in England, and the second child was born in Barbados.
- [3] In July 2013, the parties travelled to England for a family holiday. The Wife remained in England with the children, because she decided not to return to Barbados. The children were placed in school in England by the Wife. The Husband returned alone to Barbados in August 2013, and he filed for a divorce the following month.
- [4] There are, therefore, two issues before the Court, namely, whether at the time of filing for the divorce –
1. the Husband was domiciled in Barbados; and
 2. the parties were separated for the requisite period of time.

Domicile

- [5] Section 20 of the Act provides that –

“(2) Proceedings for a decree of dissolution of marriage may be instituted under this Act by a party to the marriage if, at the date on which the application for the decree is filed in the court, either party to the marriage

- (a) is a citizen of Barbados;
- (b) is domiciled in Barbados;
- (c) is a permanent resident of Barbados within the meaning of the Immigration Act; or
- (d) is an immigrant of Barbados within the meaning of the Immigration Act, and has resided in Barbados continuously for 1 year immediately preceding that date.”.

[6] Referring to this provision Simmonds C.J. observed in **Downer v Downer** C.A. No. 663 of 2007 (decision 23 May 2008), that –

“The intention of parliament is clearly to confer jurisdiction on the High Court where either party to the marriage has a connection with Barbados by citizenship, domicile or residence.”. (Para.[16]).

- [7] There is no evidence before the Court that either party has satisfied the citizenship or residency requirements of Section 20 (2) of the Act. And it is not disputed that their domicile of origin or birth is England. What this Court is called upon to decide is whether the Husband has abandoned his domicile of origin, and acquired a domicile of choice in Barbados.
- [8] The legal principles, on which a court determines whether an individual has acquired a domicile of choice in a particular country, are straightforward. These principles can be traced back to judicial pronouncements from the mid

nineteenth century. In **Munro v. Munro (1840) 7 Cl. & F. 876**, Lord Cottenham observed that –

“...the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile....Residence alone has no effect per se, though it may be most important as a ground from which to infer intention.”.

[9] Nearly 30 years later, Lord Cairns L.C. proclaimed that –

“...it is beyond all doubt clear with regard to the domicile of birth that the personal status indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal status of another domicile is acquired.”. (See **Bell v. Kennedy (1868) L.R. 1 H.L., SC. 310**).

[10] In the **Bell** case, supra, Lord Westbury noted the difference between residence and domicile. They are –

“...two perfectly distinct things.....Although residence may be some small *primâ facie* proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although that you do not find the party had any other residence in existence or in contemplation.”. (P.321).

Lord Westbury also opined that if “a fixed and settled purpose” could not be shown “with perfect clearness and satisfaction.....it follows that a domicile of origin continues.”. (P.321).

- [11] The burden of proving the acquisition of a domicile of choice is on the party alleging that the domicile of origin has been lost. (See **Winans v. A.G [1904] A.C. 287**, per Lord Macnaghten at p.290; **Millar v. Minister of Labor Home Affairs And Housing No. 93 of 2011 (Bermuda Civil Jurisdiction, decision 08 December 2011)**). Lord Macnaghten in **Winans**, *supra*, emphasised that –

“So heavy is the burden upon these who seek to show that the domicil of origin has been superseded by a domicil of choice! And rightly, I think. A change of domicil is a serious matter, serious enough when the competition is between two domicils both within the ambit of one and the same kingdom or country – more serious still when one of the two is altogether foreign. The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicil.”. (P.291).

- [12] In this case, the onus is on the Husband to convince this Court that he had a fixed and determined intention to make Barbados his permanent home, when he filed his application for the dissolution of the marriage. It is not disputed that the Husband has been resident in Barbados for ten years since 2004.
- [13] Counsel for the Husband pointed to several factors which he believed would allow the Court to find that the Husband had the required animus manendi, or the intention to remain in Barbados indefinitely. At paragraph 12 of his

written submissions filed on 01 July 2014, Mr. Pierce Q.C. highlighted the following –

1. the Husband moved to Barbados in 2004, and prior to his relocation he formed the intention to permanently reside in Barbados;
2. in furtherance of this intention, the Husband gave up his employment as a successful accountant, gave up his retirement pension, and shipped the personal belongings of his family to Barbados;
3. despite returning to England in 2006 for emergency medical treatment, he returned to Barbados with his family six months later;
4. the Husband wished to purchase property in Barbados, but as a non-national he was unable to secure a mortgage. The properties owned in England are investments only, and they are tenanted and professionally managed. When visiting England, neither the Husband nor the Wife can stay in these properties;
5. work permits were granted to the Husband by the relevant authorities in Barbados. The Husband's application for immigrant status is at the final stages of the approval process;
6. the two children were accepted into elementary school in Barbados, and approximately \$6,000.00 paid for their school fees. The younger child was born in Barbados;
7. the Husband invested in a local company that provides him with an independent livelihood; and
8. the Husband is actively involved in four local associations.

[14] Counsel for the Wife urged the Court to find that the Husband had no intention to live in Barbados permanently. Ms. Jemmott contended that the

Husband and his family are most closely connected to England. They are all U.K. nationals with the exception of the younger child. Their property and bank accounts are in England. No property is owned in Barbados. Furthermore, the Wife and the children have resided in England since July 2013, and the children are now at school in England. The parties agree that they undertook mediation in England in 2013.

[15] It was also submitted by Ms. Jemmott that any intention by the Husband to live in Barbados is inextricably linked to his family remaining in Barbados with him. His Wife and children having returned to England, the Husband's status in Barbados is transient and uncertain. In these circumstances the Husband no longer has the *animus manendi*, the intention to remain in Barbados indefinitely. The intention to live in Barbados indefinitely was premised on the assumption that the entire family would remain in Barbados indefinitely.

[16] Counsel for the Wife is also of the view that the Court should not accept the Husband's interest in a local company as any indicator that Barbados is his domicile of choice. The Husband's evidence, and the documents produced, show that the company generated losses since 2005. By the end of 2013 no significant profits had been generated. In fact, at the end of 2013 the company's debt exceeded its assets, with an accumulated loss of

\$239,888.00. Therefore, it was an uncertain business venture that should not be viewed as tying the Husband to Barbados.

[17] The Court accepts that in 2004 the Husband and Wife made a deliberate decision to move to Barbados with a 4 month old baby. As a consequence of this decision, the Husband's career as an accountant with the British government came to a premature end when he resigned his job. He is entitled to a pension when he reaches his official retirement age.

[18] The former matrimonial home and two other properties in England have been tenanted over the years. When visiting England, the family has no access to these properties, and uses alternative accommodation. The Husband's evidence is that the decision to move to Barbados was only worth making as a permanent move.

[19] The Wife also gave oral evidence which the Court considers to be critical to any decision about the Husband's domicile. She told the Court that –

“The decision in 2004 was to move to Barbados indefinitely, not permanently or forever. It was an adventure. We had an opportunity to sell the house in the UK but we decided against it. I gave up my career. I have not worked in 10 years. When we separated in the UK he said he was willing to return to the UK if it meant we would be a family. The decision on the company was made in 2003.”.

[20] Counsel for the Husband submitted that the Wife's evidence supports the Husband's stance that Barbados is his domicile of choice. She told the Court that their decision was to move to Barbados "indefinitely". However, in her mind, there is a distinction between an indefinite sojourn and a permanent or forever sojourn. How does the law address this issue?

[21] In **Re Fuld [1968] P675**, Lord Scarman stated the law thus –

“First, that the domicile of origin prevails in the absence of a domicile of choice, i.e., if a domicile of choice has never been acquired or, if once acquired, has been abandoned. Secondly, that a domicile of choice is acquired when a man fixes voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time....a domicile of choice is acquired only if it is affirmatively shown that the propositus is resident in a territory subject to a distinctive legal system with the intention, formed independently of external pressures, of residing there indefinitely.....What has to be proved is no mere inclination arising from a passing fancy or thrust upon a man by an external but temporary pressure, but an intention freely formed to reside in a certain territory indefinitely. All the elements of the intention must be shown to exist if the change is to be established: if any one element is not proved, the case for a change fails. The court must be satisfied as to the proof of the whole;.....two things are clear – first that unless the judicial conscience is satisfied by evidence of change, the domicile of origin persists: and secondly, that the acquisition of a domicile of choice is a serious matter not to be lightly inferred from slight indications or casual words.”. (Page 682 D-E, 684F and D).

- [22] Lord Scarman’s dictum in **Re Fuld** was cited with approval in **Agulian & Anr. v. Cyganik [2006] EWCA Civ 129**. In that case a Greek immigrant, who lived in London for over 40 years, was found not to have made England his domicile of choice. Longmore LJ remarked that a review of the case law confirmed that “.....a domicile of origin can only be replaced by clear cogent and compelling evidence that the relevant person intended to settle permanently and indefinitely in the alleged domicile of choice.” (Para.53).
- [23] Both counsel referred the Court to the House of Lords decision in **Mark v. Mark [2005] UKHL 42**. In that case Baroness Hale of Richmond stated clearly that –
- “An adult can acquire a domicile of choice by the combination and coincidence of residence in a country and an intention to make his home in that country permanently on indefinitely.....”.
(Para. 39).
- [24] The Wife in her oral evidence made a distinction between permanent or indefinite residence in Barbados. She said that their intention was to live here indefinitely and not permanently. However, as the case law cited above demonstrates, this Court is required to find a voluntary intention to reside in Barbados for an unlimited time. (See **Re Fuld** supra). Lord Scarman, supra, also referred to an intention freely formed to live in the country indefinitely.

[25] Although Longmore LJ in **Agulian** (supra), referred to an intention to “settle permanently *and* indefinitely”, the House of Lords in **Mark** (supra), used those words disjunctively. The Wife’s evidence supports the Husband’s contention that they decided to move to Barbados for an indefinite period. The evidence does not indicate that the parties moved to Barbados “merely for a limited time or for some temporary or special purpose.” (See Buckley LJ in **IRC v. Bullock** [1976] 3 All ER 353 at 358 e). No specific time frame was contemplated by the parties.

[26] The Court finds that the Husband was domiciled in Barbados at the time he filed his application for the dissolution of the marriage. However, the Court has not reached this conclusion based on the evidence of the Wife alone. Other factors were taken into consideration, bearing in mind the following caution from Baroness Hale in the **Augulian** case –

“Special care must be taken in the analysis of the evidence about isolating individual factors from all the other factors present over time and treating a particular factor as decisive..... [All the cases] make interesting reading, but a comparison of the facts of one domicile case with the facts of another domicile case is of little assistance in deciding this case.”. (Para.46).

[27] Quite apart from the Wife’s admission, there are other indicators that Barbados became the Husband’s domicile of choice. His 10 year residence in Barbados is a pertinent factor. Despite his journey to England in 2006 for

major medical treatment, he returned to Barbados with the family to live and continue his business pursuits.

[28] With respect to the business, the Husband is a 25 percent shareholder in B.C. Hightide Watersport Ltd. This shareholding cost him £27,813.97 in 2004. It is this local company that successfully applied for 3 work permits on his behalf. It is true that between 2005 and 2010, the company generated losses. In recent years the company generated a modest profit, but at the end of 2013 its debt exceeded its assets.

[29] However, the Court does not agree with counsel for the Wife that the Husband is engaged in an uncertain business venture, that does not tie him to Barbados. The Court is of the view that the willingness of the Husband to work through the lean years, demonstrated his commitment to the company and to remaining in Barbados. Indeed, it was counsel for the Wife who suggested to the Husband that he worked for “excessively long hours”. If there is no successful business to tie the Husband to Barbados, surely he is driven to an indefinite stay by an investment of nearly \$100,000.00 Barbados dollars.

[30] Another relevant factor is the Husband’s application for immigrant status. This too demonstrated his intention to strengthen his ties to Barbados. He

also expended thousands of dollars on school fees for his children, and secured a Barbados passport for the younger child who was born here.

[31] The Husband's involvement in local associations is also an important factor in the discussion. At paragraph 13 of his Supplemental Affidavit, the Husband said that -

“.....I have integrated myself into Barbadian society and continue to contribute significantly to its social development. I was appointed a Director of the Friends of Folkstone Foundation and I enclose herewith a Notice of Directors pursuant to sections 66 and 74 of the Companies Act as Exhibit “MGN 8”. I am also a founding member of the Barbados Association of Dive Operators and work closely with the Barbados Tourism Authority and the Barbados Hotel and Tourism Authority to promote scuba diving at international tourism trade shows through my personal attendance.”.

[32] This evidence was not challenged by the Wife. In the **Winan's** case, *supra*, Lord Macnaghten found that a deceased taxpayer did not acquire a domicile of choice in England. This Law Lord took into account the fact that there was no evidence that the deceased “was interested in any charity or charitable philanthropic institution in England.”. (P.295). In this case, the Husband is a director in one local organization, and the founding member of another. He has engaged at the local level in an effort to contribute to specific areas of national and personal interest.

[33] Counsel for the Wife asked the Court to consider that the parties owned no real property in Barbados. The Husband's explanation was the difficulty in sourcing a mortgage as a non-national. Although there is no ownership of real property, the Court cannot ignore the Husband's sizable investment in a local company.

[34] Another piece of unchallenged evidence is that the Wife's parents bought an apartment in Barbados so that they could visit their grandchildren on a regular basis. It is unlikely that grandparents would make this investment, unless they believed that the Wife and her family would be in Barbados indefinitely.

[35] Counsel for the Wife also argued that the Husband's presence in Barbados is because of a family venture. Therefore, if his family is no longer in Barbados, he no longer has the *animus manendi*, the intention to remain in Barbados indefinitely.

[36] The Court has determined that the Husband intended to remain in Barbados indefinitely. As a result, Barbados became his domicile of choice. The Husband did say to the Court that –

“I have always intended for my family to live with me in Barbados.....I love my children, and I would have done whatever it took to have my children in the same house.”

He did not deny the Wife's evidence that when they separated in July 2013, he told her that "...he was willing to return to the UK if it meant [they] would be a family.". (See para. [19] of this judgment, supra).

[37] The Court cannot, without more, make a finding that when the Husband filed for the divorce, he had abandoned Barbados as his domicile of choice, and resumed his domicile of origin in England. Even if the Court accepts that the Husband is now reconsidering his continued presence in Barbados, there is no evidence that he had abandoned Barbados as his domicile of choice when he filed these proceedings.

[38] The Court also notes that neither party gave any evidence about contingency plans. Would a medical or other emergency have cut short their stay in Barbados? After the Husband's medical treatment in England, the family returned to Barbados. There is no hint that they considered remaining in England. There is no evidence of a plan to return to England on the expiration of an agreed period of time. There is no evidence of anything written or said by the Husband to indicate that his ultimate plan was to return to England at some time in the future to live permanently.

[39] Finally, counsel for the Wife insisted that the matrimonial jurisdiction for the purposes of a divorce between these parties is England. Ms. Jemmott argued that access to the Barbados courts should not be permitted to

transient forum – shoppers. This argument is not relevant to the factual matrix of the present case. There is no application for dissolution of the marriage in any jurisdiction other than Barbados. And, more importantly, there is no application by the Wife before this Court requesting a stay of proceedings on the basis of the doctrine of forum non conveniens. Therefore, any strong connections that the parties have to England, have been superceded by the Husband's acquisition of a domicile of choice in Barbados.

The Date of Separation

- [40] Section 27 (2) of the Act provides that a decree for the dissolution of a marriage should not be made unless the court is satisfied that the parties were separated, and thereafter lived separately and apart, for a continuous period of at least 12 months prior to the filing of the application. The Wife contended that the parties separated on 28 July 2013, when she informed the Husband that she was leaving him, and that she did not want to return to Barbados.
- [41] The Husband's application was filed on 04 September 2013. Paragraph 8 of the application alleges that the parties separated on or about 2006, but that they continued to share the same matrimonial home. At paragraph 9 the stated circumstances of the separation in 2006 were little or no communi-

cation; lack of intimacy or sexual intercourse; statements by the Wife that she no longer wished to remain in the marriage; her refusal to stay with the Husband during the family holiday to England in 2013; and her refusal to return to Barbados with the children.

[42] The Husband wishes this Court to accept that the parties separated in 2006, the same year that the second child was born, and the same year they returned to Barbados following his medical treatment in England. And, significantly, he expected the family to stay together in England during the summer of 2013. In fact, he described this trip as a family holiday. Also, according to him, some of the events of separation occurred 8 years after 2006.

[43] The Husband's oral evidence is that in February 2013 the marriage was a lost cause. However, he also told the Court that "I have never sat back and considered myself to be separated. I have felt and known all along that my marriage hung by a thread." The Court accepts that this marriage was challenged.

[44] There is an 18 year age difference between the parties. They argued but continued to share the same bed. Neither of them had moved into a separate bedroom. Sexual intercourse was infrequent but it occurred. The Wife

believed that her needs were not being met. The Court accepts her evidence that she would not share a bed with someone from whom she was separated.

[45] The Court is of the considered opinion that the parties separated on 28 July, 2013, when the Wife informed the Husband that she was leaving him. She subsequently remained in England with the children of the marriage. Therefore, the Husband's application for a dissolution of the marriage was premature, and this Court is unable to grant a decree of dissolution of marriage.

Resumption of Cohabitation

[46] Section 27 (3) of the Act stipulates that –

“A decree of dissolution of marriage shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.”.

[47] The Court has had the opportunity to observe and listen to these parties during the hearing on 14 April 2014. The Wife was taken by surprise by the Husband's application for dissolution. Although she declared her readiness to leave the marriage, she did not contemplate the immediate downward spiral towards a divorce. There were poignant moments in their testimony.

[48] For example, the Wife conceded that she was now willing to do counselling, “because anything is better than doing this.”. She added that –

“There was still something there. The divorce proceedings were too soon. I am not ready for this.....Every marriage has its up and downs.... You don't give up when you have difficult times. You hope that things would change.”.

[49] Likewise the Husband walked away from mediation in England because he was asking for counselling. He revealed that –

“I love my children and I would have done whatever it took to have my children in the same house.”.

It is this statement that leads the Court to believe the Wife when she informed the Court that, when they separated in July 2013, the Husband told her that he would be willing to return to the UK if it meant that they would be a family.

[50] The Wife wishes to save her marriage. The Husband wants his family together. They are both willing to undergo counselling. For these reasons the Court believes that reconciliation is possible, and urges the parties to undertake the counselling that may yet preserve this family unit.

Sonia L. Richards

Dr. Sonia Richards
Judge of the High Court

