

***Judgment 31/2007**

**D v D – Royal Court (Divorce File 6467)
– 20th September 2007**

(*formerly C v C issued 09.10.07)

Matrimonial Causes (Guernsey) Law, 1939 – application for an order to give effect to an agreement as respects ancillary relief - Respondent unable to proceed with the proposed settlement – held that any agreement between the parties must be approved by the Court before it will have legal effect – held that it would be wrong to give effect to the agreement without first hearing evidence – application dismissed

IN THE ROYAL COURT IN THE ISLAND OF GUERNSEY

MATRIMONIAL DIVISION

No: 6467

Before: Richard John Collas, Deputy Bailiff

On the 20th day of September, 2007

Between: D Petitioner
and
D Respondent

In the matter of the Final Order of Divorce granted by the Matrimonial Causes Division of the Royal Court on the 17th August 2004 and in the matter of the application by the Petitioner under the provisions of Part VIII of the Matrimonial Causes (Guernsey) Law, 1939, as amended;

THE COURT issued Judgment based upon written submissions from Counsel in the terms attached hereto and DIRECTED that it would be wrong to make an Order giving effect to the parties' agreement without hearing evidence and DISMISSED the application.

C A RODGER

Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
MATRIMONIAL CAUSES DIVISION

Between	D	Petitioner
	and	
	D	Respondent

Judgment handed down on 20 September 2007

Before: Richard John COLLAS Esq., Deputy-Bailiff

Judgment on a Preliminary Point

Advocate for the Petitioner: A N Brown
Advocate for the Respondent: Mrs F J Haskins

Cases, texts & statute referred to:

1. The Matrimonial Causes (Guernsey) Law 1939 as amended.
2. The Matrimonial Causes Act 1973, section 25.
3. Burnard v Burnard (Court of Appeal 20 July 2005)
4. Xydhias v Xydhias [1991] 1FLR 683
5. Edgar v Edgar (1981) 2 FLR 19

1. This is my decision on a preliminary point, based upon the very helpful written submissions received from Counsel and without having heard oral argument.
2. A Final Order of Divorce was granted between these parties on 17 August 2004. By application dated 25 October 2006, the Petitioner applied to the Royal Court seeking a lump sum by way of ancillary relief.
3. Thereafter the parties negotiated settlement terms and the Petitioner contends they have reached a concluded agreement which should be given legal effect without any further hearing in order to save time and costs. The Respondent says she is unable to proceed on the agreed terms. The Court always encourages parties to seek to save costs, especially in cases such as the present where the matrimonial assets are modest.
4. The principal asset is the former matrimonial home. The value is not agreed. Each of them has filed a Form A in which the Petitioner valued it at £300,000 and the Respondent at £275,000. (In November 2004 two estate agents estimated £260,000 and £280,000.) The outstanding mortgage is about £45,000 so the equity was thought to be about £242,000 based upon the average of the recent valuations. The only other assets are the balances in the parties' respective bank accounts which total a little more than £10,000.

The negotiations

5. I will summarise the factual background briefly. The matter had been listed for an FDR hearing on 12 April 2007. Two days before, the Respondent's Advocate wrote to the Petitioner's Advocate in an open letter proposing the former matrimonial home be transferred into the Respondent's sole name, she would live there with the child of the marriage and she would pay a lump sum of £100,000 to the Petitioner.
6. On the morning of the FDR hearing, the Petitioner's Advocate contacted the Respondent's Advocate accepting the offer with a small proviso. Minutes later the Respondent's Advocate confirmed matters were agreed on that amended basis. Next, the Petitioner's Advocate wrote confirming that settlement had been reached and advising that he would now prepare a Consent Order. The FDR hearing was vacated.
7. On 18 April the Petitioner's Advocate wrote to the Respondent's Advocate with, inter alia, a draft Consent Order. Five days later the Respondent's Advocate responded with amendments which included the insertion of a new provision that the Respondent retain a Mini Mayfair motor vehicle with a four digit registration number as her sole and absolute property. The following day, the Respondent's Advocate wrote saying the matter could not proceed as planned on 26 April 2007 as her client's finance was not in place. The Petitioner has drawn to my attention that the need for finance had not previously been mentioned and the original offer had not been made subject to finance.
8. On 18 May, the Respondent's Advocate advised that an Estate Agent instructed by the Respondent's bank had valued the property at only £245,000 which was £30,000 less than her own Estate Agent had previously valued it and £55,000 less than the Petitioner's valuation. Consequently the bank would not lend the amount she needed. So, the Respondent could see no alternative but to place the property on the market for sale to a third party. She was unable to proceed with the proposed settlement terms.

The Law

9. The Respondent relied upon Article 27 of the Matrimonial Causes (Guernsey) Law 1939 as amended, which provides as follows:-

“No agreement for or in relation to separation between married persons which is made after the commencement of this Law while the parties thereto are resident within the Bailiwick shall have any legal validity in the Bailiwick unless it is sanctioned pursuant to a decree or pronouncement of judicial separation by a Court in the Bailiwick competent to make such decree or pronouncement”.

In my view Article 27 is concerned with agreements made during the marriage, before a judicial separation has been pronounced, and not to agreements made after a divorce.

10. However I do accept the principle that any agreement reached between the parties must also be approved by the Court before it will have legal effect. As the English Court of Appeal held in Xydias v Xydias [1991] 1FLR 683 in a judgment delivered by Thorpe LJ at page 691:

“My cardinal conclusion is that ordinary contractual principles do not determine the issues in this appeal. This is because of the fundamental distinction that an agreement for the compromise of an ancillary relief application does not give rise to a contract enforceable in law. The parties seeking to uphold a concluded agreement for the compromise of such an application cannot sue for specific performance. The only way of rendering the bargain enforceable, whether to ensure that the applicant obtains the agreed transfers and payments or whether to protect the respondent from future claims, is to convert the concluded agreement into an order of the court. The decision of the Privy Council in de Lasala v de Lasala [1980] AC 546 (1979) FLR Rep 223 demonstrated that thereafter the rights and obligations of the parties are determined by the order and not by any agreement which preceded it.”

11. Xydias is also authority for the proposition that a concluded agreement may have been reached between the parties to the former marriage, even though similar facts might not suffice to prove a contract at common law. Also, that there is a distinction between the substantive terms of an agreement in a divorce case and the detail required to put it into effect. Matters of security, time to pay and so forth are points of detail only. The leading case in this area is probably Edgar v Edgar (1981) 2 FLR 19 which I have considered with great care.
12. It is important to look at the facts of each of those cases in order to see the nature of the agreement relied upon in each case. In Edgar the parties had agreed and executed a Deed of Separation on April 1 1976 which was later varied for tax reasons, but otherwise relied upon by the parties until, in November 1978, the wife petitioned for divorce and applied for all forms of ancillary relief, even though the Deed contained an acknowledgement by her that she would not seek any further provision from the husband.
13. In Xydias, the district Judge found that the parties had agreed terms, based upon the fourth draft of a Consent Order, shortly before the trial date for the hearing of the wife’s ancillary relief claim and as a result of the agreement the hearing date was vacated. The facts of the present case are very much closer to those of Xydias than to the facts of Edgar.

Conclusion

14. In the present case there are two distinct steps I must consider: first, had the parties reached a concluded agreement; and second, will the Court give it legal effect?
15. In relation to that first step, it does appear that the parties had reached agreement. However it is the second step which I believe presents a difficulty for the Petitioner.

16. The Court's powers to order a re-vesting or distribution of property are contained in Article 46 of the 1939 Law. In exercising those powers, it is well established that the Royal Court will take into account all the circumstances of the case and have regard to the factors set out in Section 25 of the Matrimonial Causes Act 1973 (see for example *Burnard v Burnard (Court of Appeal 20 July 2005)*, paragraph 13).
17. In my opinion, the circumstances of this case to which the Court would have to have regard include the terms on which the parties were prepared to agree and the basis upon which such agreement was reached. It would be unfair to the Respondent to disregard her reason for withdrawing the offer. If the Petitioner wishes to argue that was not the true reason or that another bank would be prepared to lend the money required, he should have the opportunity to do so.
18. I therefore conclude that it would be wrong to make an order giving effect to the parties' agreement without hearing evidence. The terms or proposed terms of the agreement and the basis upon which it was reached are in my view admissible in evidence. If after hearing all the evidence I am persuaded that the Respondent withdrew from the agreement because she could not raise the funds required then it is highly unlikely that I would approve the terms of the agreement.
19. The Respondent has urged me to take account of the need to ensure costs are not wasted unnecessarily. I am sure that is a fact that the parties would wish to take into account in their negotiations prior to the hearing. However, it does not alter the legal principles I must apply and does not change my decision.
20. I therefore dismiss the Petitioner's application to give effect, at this preliminary stage, to the terms allegedly agreed.