C.A. Divorce – Decree Absolute – Child – Arrangements for care and welfare of relevant child – Whether satisfactory – whether impractical for court to make arrangements. S27 Matrimonial Causes Act. Appeal against order that decree nisi be not made absolute until arrangements made.

JAMAICA

IN THE COURT OF APPEAL

Case referred to A v A (1979) 2 All ER 193

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SUPREME COURT CIVIL APPEAL NO. 96/92

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

BETWEEN	ANTHONY RONALDO SEBASTIAN	APPELLANT
A N D	BRIDGETTE-MAY SEBASTIAN	RESPONDENT

Ransford Braham for Appellant

Respondent not present or represented

Civil Procedure (Family Law)

March 2 and 22, 1993

CAREY P. (AG.):

This is an appeal against an order of Reckord J. dated 25th September 1992 whereby it was decreed that the appellant's application for the decree nisi pronounced in Suit No. F1991/S161 between these parties on the 18th February 1992 by Clarke J. should not be made absolute. The learned judge held that he was not satisfied as to the arrangements for the care and welfare of the relevant child.

The relevant provision governing this matter is section 27 of the Matrimonial Causes Act which states as follows:

> "27.-(1) Notwithstanding anything in this Act but subject to subsection (2), the Court shall not make absolute a decree for the dissolution or nullity of marriage in any proceedings unless it is satisfied as respects every relevant child who is under eighteen that -
>
> (a) arrangements for his care and upbringing have been made and are satisfactory or are the best that can be devised in the circumstances; or
>
> (b) it is impracticable for the party or parties appearing before the Court to make any such arrangements.
>
> (2) The Court may, if it thinks fit, proceed without observing the requirements of subsection (1) if -
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> (a) it appears that there are circumstances making it desirable that the decree should be made absolute or should be made, as the case may be, without delay; and
>
> (b) the Court has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children before the Court within a specified time."

This provision, in my view, imposes a duty on the Court to ensure that satisfactory arrangements are made for the care and upbringing of the child. The learned author of Bromley's Family Law (Seventh Edition) deals with a similar provision (section 41) in the English Matrimonial Causes Act 1973 at p. 299:

> "It is a notorious and lamentable fact that the persons most likely to suffer when a marriage breaks down are the children. As a means of ensuring that proper arrangements have been made for them, the court must withhold a decree unless the provisions of section 41 of the Matrimonial Causes Act are complied with."

Later he states:

> "Too rigid an application of these provisions could obviously work hardship in many cases. Any arrangements proposed can be satisfactory only if they are reasonably permanent, so that any dispute over custody would have to be resolved before the court could make a declaration. Again, where a child is to live may depend on one party's remarriage or the financial provision to be ordered at a later stage and a minute examination of the spouses' income and assets could cause intolerable delays. Consequently the statutory requirements must be interpreted sensibly. If the parties can agree on the provision to be made for a child, the court is not required to make a detailed enquiry into the terms proposed unless it has reason to believe that the sum is inadequate or that a significantly better order could be obtained, and it is immaterial whether the money will come from a parent, a third person or supplementary benefit. If there is a contest over custody which is likely to be resolved within a short period, the judge can defer making an order under section 41. In other cases 'the primary purpose of [the section] is to ensure that the judge is seised of the question of the interests of the children'."

In Cretney's Principles of Family Law (Fourth Edition) at p. 389:

> "The primary purpose of this provision is to ensure that the court does not overlook the question of the interests of the children. If the parties do agree about custody arrangements, the judge will nevertheless look into them in order to ensure that they are satisfactory (or the best that can be devised in the circumstances): if the parties disagree the issue will have to be resolved by the court after hearing all the evidence. If the custody hearing is to take place fairly soon the court will probably not wish to declare that the existing arrangements are satisfactory. Since they may be challanged in the custody hearing: but if there is likely to be a considerable delay the court should consider making the section 41 declaration unless there is some positive advantage to the children in deferring the making of the decree absolute."

The case to which both authors refer in support of the judicial approach to this matter is A. v. A. [1979] 2 All E.R. 493 at p. 496 where Ormrod L.J. said:

> "In my judgment, the primary purpose of s 41 is to ensure that the judge is seised of the question of the interests of the children. If there is no issue between the parents, a declaration under one or other of the alternatives provided in s 41 should be made, unless there are specific matters about which the judge requires to be satisfied in the immediate future, or for some other reason the sanction or withholding decree absolute is likely to be useful."

In 1969 when the Divorce Act, the predecessor of the Matrimonial Causes Act, was in force, an amendment was enacted imposing on the Court for the first time, the duty of withholding decrees absolute unless it was satisfied, arrangements were made as regards relevant children and were satisfactory or were the best that could be devised, alternatively that it was impracticable for the petitioner to make any arrangements. The same provision was re-enacted in the Matrimonial Causes Act 1989 which repealed the Divorce Act. Prior to 1969, children of broken marriages were not the concern of the Court in divorce proceedings unless there was a contest in relation to custody of any child of the marriage. Since then a more enlightened approach has been introduced. It is now tolerably clear from what the academics have written and from what was said by the learned Lord Justice in A. v. A. (supra) that the judge must be "seised of the question of the interests of the [child]." In my view, so as to be able to be concerned with the interests of the child, the judge must be given material as to arrangements on which he can exercise his discretion whether to grant or withhold the decree absolute. Even where no arrangements can be made by the petitioner because it is impracticable to do so, nevertheless, as it seems to me, material must be provided to enable confirmation of that fact. I venture to suggest that if the norm is for satisfactory arrangements or those which are the best, then, where no arrangements are at all possible, there is, if anything a greater onus on the party before the Court to provide material showing that it is impracticable

to make such arrangements. The basic principle in regard to children's welfare is enshrined in the Children (Guardianship and Custody) Act at section 18 which ordains as follows (so far as material):

> "... or the administration of any property belonging to or held on trust for a child, or the application of the income thereof, ..., and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

I can now examine the facts as they were before Reckord J. The petition for dissolution of the marriage which was filed by the husband was heard by Clarke J. on 18th February, 1992 who pronounced a decree nisi but reserved the question of custody for hearing in Chambers. That order could in no way be faulted because of the amorphous nature of the Statement of Arrangements filed in respect of the relevant child who was born 5th September 1987. I set it out below:

> "The proposed arrangements for the care and upbringing of SIMONNE SEBASTIAN, the relevant child under the age of 18 years are as follows:
>
> (a) **RESIDENCE:** Your Petitioner believes that the relevant child resides with her maternal grandparents at 20 Temple Mead, Jack's Hill, Saint Andrew. It is a four-bedroom or five bedroom house. The relevant child has been residing between the Respondent and the maternal grandparents since the marriage finally broke up in January, 1988. The maternal grandparents are in their mid-fifties and sixties.
>
> It is proposed by the Petitioner that the relevant child reside with either the Petitioner or the Respondent. Your Petitioner would be prepared to have her reside with him and in that event she would reside with me and I would make the necessary arrangements for accommodation and for a Helper to see to her welfare.

"(b) **EDUCATION:** Your Petitioner would seek to educate the relevant child.

(c) **FINANCIAL PROVISION:** Your Petitioner is prepared to take care of the relevant child's maintenance.

(d) **ACCESS:** It is proposed that whoever has physical control of the child should allow access to the other party.

The child is not suffering from any serious disability or chronic illness."

I would add that the petitioner sought in his prayer to have an order for joint custody.

At all material times, the wife resided in North Lauderdale, Florida, U.S.A., that was the address endorsed on the notice to appear. In her affidavit, she did not state her true place of abode and postal address in Florida save to say it was in North Lauderdale. She deposed that she saw the child, a daughter during school holidays either in this country or in Florida where the child would go to stay with her on those occasions.

When the summons for custody came on for hearing before Master Harris on 26th May, 1992, she adjourned the summons sine die but granted access to the father. She also forebade either party to remove the child from the jurisdiction.

When the motion for decree absolute came on for hearing before Reckord J. on 25th September 1992, there was an affidavit dated 29th July, 1992 filed by the petitioner in support. Having deposed that the respondent who was absent from the hearing, desired to contest the summons, he continued in paragraphs 4 and 5 as follows:

4. **THAT** it further transpired that the Respondent had left the Jurisdiction prior to the proceedings for custody in Chambers on Tuesday 26th May, 1992 as my Attorneys at Law received a letter from Gresford Jones, the Attorney on record for the Respondent, on the 27th May, 1992 to say (from information they had received) she had left Jamaica prior to the proceedings before the Master on the 26th May, 1992 (a copy of the said letter is exhibited hereto marked 'A').

A copy of the Respondent's Affidavit of 22nd May, 1992 is exhibited hereto marked 'B'.

5. **THAT** I am in the process of having investigations conducted as to the whereabouts of the Respondent in Florida, U.S.A. and the relevant child with a view to taking such steps as are legally open to me to ensure that the child be returned to this Jurisdiction so that the Court can make an Order as to her custody and welfare generally.

No useful purpose would be served in pursuing the custody proceedings in Jamaica until attempts are first made to the results of my enquiries as to the whereabouts of the relevant child and I ask that a Decree Absolute be pronounced in this cause at this time."

These facts make it abundantly clear that the Court could not be satisfied as respects arrangements with regard to the child, for none had been made. Thus the question for determination is whether the evidence before the Court satisfied section 27(1)(b) viz., that it was impracticable for the husband to make arrangements which were satisfactory or the best that could be devised.

If, as I have ventured to suggest, a greater, or at all events, an onus lies on the husband to demonstrate to the required civil standard that it was impracticable to make arrangements, then evidence that he is "in the process of having investigations conducted as to the whereabouts of the respondent" fall short of any such standard. It would, in my view, be essential to show the result of

any enquiries being made. At the very least, he would have to show what efforts had in fact been undertaken by him. For myself, I can think of no more imprecise or vague phraseology than "in the process of having investigations conducted."

The absence of the respondent from the jurisdiction, neither prevents service of the summons on her nor prevents the obtaining of an order for substituted service. Armed with an order for custody, he could pray in aid the powers of the Florida Court to have the child returned to the jurisdiction. Courts in the U.S.A. recognize the Convention on the civil aspects of international child abduction. His affidavit in support of his summons for custody could properly and should include the arrangements he planned for the welfare of the child.

In my view, the question of granting a decree absolute without being satisfied as to arrangements only arises in circumstances to which subsection 2 of section 27 is applicable, viz. where circumstances make it desirable that there should be no delay and an undertaking in terms of the subsection has been given by the party to bring the question of arrangements before the Court within a specified time. I say this in the light of the opinion of Ormrod L.J. in A. v. A. (supra) at p. 496:

> "If there is an issue as to custody which is to be heard at a later date, the s. 41 proceedings can be deferred until the question of custody is decided, provided that the delay is likely to be fairly short; if a considerable time is likely to elapse then consideration should be given to the existing de facto arrangements. If these appear reasonably satisfactory, though not necessarily the best that can be made (that will be decided at the custody hearing), a declaration in the form of s 41(1)(b)(i) can be made or, if there is difficulty about this, consideration should be given to a s 41(1)(c) declaration unless there is some positive advantage to be gained for the children in deferring the decree absolute."

By way of explanation, the reference to section 41 (1) (b) (i) is the English equivalent of our section 27 (1) (a) of the Matrimonial Causes Act while section 41 (1) (c) is the English equivalent of our section 27 (2). It is plain from what is stated in the above extract, that always some arrangements must either have been made or where none has been made, there is in prospect some certainty that they will be made so that an undertaking can be had under section 27 (2) of the Act. Where it is wholly impracticable to make arrangements, then it seems to me clear that the reasons therefor must be demonstrated by cogent evidence because the very mischief which the provision is designed to obviate would occur: the child would be bound to suffer. I am quite unable to accept that a judge is seised of the interests of the child when he knows absolutely nothing of any arrangements for the child's welfare by either party.

There was some suggestion during the arguments that the mother having removed the child from the jurisdiction was in breach of her undertaking made to the Court and accordingly her contumelious act should not be used to prejudice the petitioner's position. There really is no evidence before the Court of any particular hardship which the petitioner is suffering by reason of the refusal to make the decree absolute. There is no evidence that he is desirous of re-marrying or has started another family and wishes to regularize the position. There is total and absolute silence in that regard.

We are however required constantly to have in mind the welfare of the child as the first and paramount consideration. Therefore, the respondent's conduct in removing the child to whereabouts unknown is in my view, insufficient answer to the question whether it is impractical to make arrangements. As I have already suggested, he must go further and show he has made the effort to find mother and child, and the result of that effort.

Before leaving this matter, I desire to remind that the requirement that a petitioner should set out the arrangements for the care and upbringing of a child should be taken quite seriously. They should therefore be full and complete rather than laconic and exiguous. The arrangements must deal with the entire welfare of the child, i.e. its moral and physical welfare. I have had an opportunity of examining a fairly large number of Statements of Arrangement under the Matrimonial Causes Rules and that sample indicates that the contents of this document incline rather to brevity and minimal information. Judges should be mindful of the provisions of section 27 and not hesitate to withhold the granting of decrees absolute unless they are satisfied in terms of that provision.

I am of opinion therefore that the judge came to a correct decision which I would affirm. I would dismiss the appeal.

FORTE, J.A.

I have had the opportunity of reading in draft, the judgments of Carey P. (Ag.) and Patterson J.A. (Ag.) and agree with the reasons and conclusions therein.

By way of emphasis only I wish to state that this appears to be a case in which the appellant may, up until the present have had some difficulty in satisfying the provisions of section 27 (1) (a). He may, however, have been able to call in aid the provisions of section 27 (1) (b) but that factor has yet to be established on the basis of the evidence which was before the learned judge. Quite apart from the fact that the child's absence from the jurisdiction has not been properly proven, even if that were fact, the appellant has not shown that he has done sufficient to satisfy the Court that he has at least attempted to make proper arrangements for the child's welfare. The matter of custody, though adjourned, could again be brought before the Court by serving the summons on the attorneys on record for the respondent. Given the fact that the respondent has deposed that the child in fact leaves the jurisdiction from time to time, there is really no concrete evidence that the child's absence is now permanent. There is nothing in the evidence to show that the mother and child, if now outside of the jurisdiction, would not return to the island to deal with the matter of custody, and the making of proper arrangements for the child's welfare. I am, therefore, specifically in agreement with Carey, P (Ag.) when he finds that the appellant had not proven that the circumstances are such that it is impracticable for him to make arrangements for the care and upbringing of the child. Had he done so, I would have been persuaded to find that the learned judge was wrong in refusing to make the decree absolute - the contrary being true, I agree with my learned brothers that the appeal should be dismissed.

PATTERSON, J.A. (Ag.):

This is an appeal from the judgment of Reckord, J. whereby he refused the application of Anthony Ronaldo Sebastian (the appellant) to make absolute a decree nisi of dissolution of his marriage to Bridgette-May Sebastian (the respondent) on the ground that he was not satisfied as to the arrangements for the care and welfare of the relevant child.

Section 27(1) of The Matrimonial Causes Act, 1989, (the Act) provides:

> "27.--(1) Notwithstanding anything in this Act but subject to subsection (2), the Court shall not make absolute a decree for the dissolution or nullity of marriage in any proceedings unless it is satisfied as respects every relevant child who is under eighteen that--
>
> (a) arrangements for his care and upbringing have been made and are satisfactory or are the best that can be devised in the circumstances; or
>
> (b) it is impracticable for the party or parties appearing before the Court to make any such arrangements.
>
> (2) The Court may if it thinks fit proceed without observing the requirements of subsection (1) if--
>
> (a) it appears that there are circumstances making it desirable that the decree should be made absolute or should be made, as the case may be, without delay; and
>
> (b) the Court has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children before the Court within a specified time."

The real issue in this appeal is whether or not the learned judge was wrong in not exercising his discretion under section 27 (1)(b) of the Act. Clarke, J., who pronounced the decree nisi, did not certify, in accordance with the provisions of Rule 37(2) of the Matrimonial Causes Rules, 1989, (the Rules) that he was satisfied as to the arrangements for the care and upbringing of

the relevant child. The appellant, on applying for the decree absolute, did not file an affidavit setting out the arrangements now proposed for the relevant child, in compliance with the provisions of Rule 38(8) of the Rules. Section 27(1)(a) of the Act had not been satisfied.

The material that Reckord, J. had for consideration may be summarised as follows:

1. There was evidence that the appellant had instituted proceedings under the Children (Guardianship and Custody) Act for custody of the relevant child. The matter was contested, and on the 26th May, 1992, it was adjourned sine die. It remained for the appellant to apply for a hearing date.

2. It was believed that prior to the 26th May, 1992, the respondent had left the jurisdiction.

3. The appellant, in an affidavit, said that he was in the process of having investigations conducted as to the whereabouts of the respondent in "Florida, U.S.A. and the relevant child with a view to taking such steps as are legally open to me to ensure that the child be returned to this jurisdiction so that the Court can make an Order as to her custody and welfare generally."

4. There was evidence that the relevant child was ordinarily resident within the jurisdiction and only paid periodical visits abroad.

Before us, it was argued that the respondent had left the jurisdiction, taking with her the relevant child, and, therefore, no useful purpose would be served in pursuing the custody proceedings at this time. Further, having regard to the lengthy period of time that may elapse before the custody proceedings are determined, the learned judge should have taken all that into consideration and exercised his discretion to make absolute the decree nisi. In support, the case of A v A (children: arrangements) [1979] 2 All E.R. 493, was cited. In that case, the wife appealed against the trial judge's refusal to grant a declaration under section 41(1) of The Matrimonial Causes Act, 1973 (U.K.), which section is somewhat similar to section 21(1) of The Matrimonial Causes Act, 1989 (supra). It was held:

> "The primary purpose of s 41 of the 1973 Act was to ensure that the judge was seised of the question of the children's interests and if there was no issue between the husband and wife on custody, the judge ought to make a declaration under one of the alternatives set out in s 41(1) unless there were specific matters on which he was required to be satisfied or for some other reason the sanction of withholding a decree absolute would be useful. If, however, there was an issue between the parties on custody, a s 41 application could be deferred until the issue was decided provided the delay in deciding the issue was likely to be fairly short; but where a considerable time was likely to elapse before the issue was decided, the judge should consider the existing de facto arrangements for the children and, if they appeared to be reasonably satisfactory, should make a declaration in the form of one or other of the alternatives in s 41(1)(b)(i), or, if there was difficulty about that, should consider granting a declaration under s 41(1)(c)."

In my view, there was no evidence that the relevant child had left the jurisdiction permanently, the evidence is to the contrary. It is not necessary for the respondent to be within the jurisdiction when the summons for custody comes on for hearing, she is represented by counsel. I see no reason why the custody proceedings cannot be pursued and proper arrangements provided by the appellant for the care and upbringing of the relevant child. There was nothing, in my opinion, to properly base a finding that it is impracticable for the appellant to make satisfactory arrangements, or arrangements that are the best that can be devised in the circumstances for the care and upbringing of the relevant child.

The learned judge must have taken into account the fact that the issue of the custody of the relevant child remained to be decided, and any delay in that regard could only be occasioned by the appellant. Accordingly, in the exercise of his discretion, the learned judge properly refused to make absolute the decree for the dissolution of the marriage between the parties as he was "not satisfied as to the arrangements for the care and welfare of the relevant child."

I have given careful consideration to the material that was before the learned judge, and in my judgment, he was right in his decision, and therefore, it ought not to be disturbed. Accordingly, I would dismiss the appeal.